93-819

No.

Supreme Court, U.S.
FILED
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OFFICE

In The

Supreme Court of the United States

October Term, 1993

BRENDA JANEAU,

Petitioner,

vs.

PITMAN MANUFACTURING COMPANY, INC.,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the policy favoring disposition of cases "on the merits" requires reinstatement of an action in which both parties were actively engaged in timely discovery depositions less than seven days prior to judgment of dismissal with prejudice;

2. Whether a trial court's dismissal power should be exercised "*only* on the face of a record of delay or contumacious conduct *by the plaintiff*";

3. Whether the proper exercise of a trial court's dismissal power requires a determination of the plaintiff's own privity to "delay or contumacious conduct';

4. Whether expert testimony is indispensable to establish a *prima facie* case in a defective product action.

LIST OF PARTIES

The following are parties who have a real or potential interest in the outcome of this case:

Pitman Manufacturing Company, Inc.: Francis H. Brown, III, George Frazier, Lemle & Kelleher, 601 Poydras Street, 21st Floor, Pan-American Life Center, New Orleans, Louisiana 70130;

Brenda Janeau: Michel P. Wilty, Robert B. Keaty, Keaty & Keaty, Attorneys at Law, Suite 104, One Lafayette Square, 345 Doucet Road, Lafayette, Louisiana 70503, Attorneys for Petitioner.

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No.

In the

Supreme Court of the United States

October Term, 1993

BRENDA JANEAU,

Petitioner,

vs.

PITMAN MANUFACTURING COMPANY, INC.,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

Brenda Janeau hereby petitions the Court to issue a Writ of Certiorari to review the Judgment and Opinion of the United States Court of Appeals for the Fourth Circuit entered on July 27, 1993.

OPINIONS BELOW

The Per Curiam Opinion of the Court of Appeals is unpublished pursuant to I.O.P. 36.5 and 36.6. The case number in the Court of Appeals for the Fourth Circuit is 92-1923.

The ruling of the District Court is unreported. The case number in the Western District of North Carolina, Charlotte Division, is 90-194-V.

STATEMENT OF JURISDICTION

The decision of the United States Court of Appeals for the Fourth Circuit was entered July 27, 1993. An Application for Rehearing was timely filed and subsequently denied on August 24, 1993. This Court has jurisdiction to review the decision of the Court of Appeals pursuant to 28 U.S.C. § 1254. The District Court had jurisdiction over the case pursuant to 28 U.S.C.A. § 1332. The Court of Appeals had jurisdiction over the matter under 28 U.S.C. §1291.

CONSTITUTIONAL PROVISIONS INVOLVED

The relevance of particular constitutional provisions is not raised in this matter.

STATEMENT OF THE CASE

Following removal to federal court, as well as multiple case transfers, a judge's recusal, and docket reassignments, Petitioner's tort claims for the wrongful death of her son, John Janeau, were summarily dismissed on May 14, 1992.

The "Scheduling Order"[1] entered by the District Court on *March 3, 1992* allowed the parties to amend their pleadings and add new parties until May 15, 1992, *eight days after* the Order of Dismissal.[2] Moreover, the District Court's March 3, 1992

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1. *See* Appendix E, *infra*, page 17a.

2. *See* Appendix D, page 12a.

Scheduling Order would have allowed the parties to conduct further discovery until July 1, 1992, more than forty-five days *after* Petitioner's case was dismissed.

Six days prior to the judgment dismissing Petitioner's claims, counsel for the parties completed seven "fact witness" depositions which began on May 6, 1992. Nonetheless, because the Petitioner had not designated a trial expert within the time allotted by the District Court (April 15, 1992), the Respondent urged its "Motion to Dismiss and/or Alternatively to Strike Plaintiff's Use of Experts at the Trial of this Matter".

Absent any assertion that the trial on the merits would be delayed or prolonged unless expert testimony was presented, the trial court dismissed Petitioner's claims with prejudice.

* * *

Petitioner's son, John Janeau, died on December 5, 1988, following an on-the-job electrocution accident in which a defective crane, manufactured by the Respondent, contacted an overhead power line.

On November 2, 1989, Petitioner was appointed Provisional Administratrix of the "Succession of John Ray Janeau" by the 25th Judicial District Court for the Parish of Plaquemines, Louisiana, where she resided. Subsequently, on November 29, 1989, *the underlying action for wrongful death and survival damages was timely filed in the Civil District Court for the Parish of Orleans, State of Louisiana.* Petitioner's original claims were premised upon the Respondent manufacturer's "duty to warn" of unreasonable hazards and dangers arising from design and manufacturing defects in the subject crane.

Respondent filed a "Notice of Removal" on January 4, 1990,

thereby removing the case to the United States District Court for the Eastern District of Louisiana. While the Petitioner's claims were pending in the federal court in Louisiana, Petitioner's counsel conducted the thorough and lengthy deposition of the Respondent, Pitman Manufacturing Company, Inc., pursuant to Rule 30(B)(6) of the Federal Rules of Civil Procedure. Thereafter, on motion by Respondent, this matter was transferred to the United States District Court for the Western District of North Carolina,Charlotte Division, on June 25, 1990. Following the transfer of this action to the Charlotte Division of the United States District Court for the Western District of North Carolina, extensive fact witness depositions were conducted in North Carolina by Petitioner's undersigned counsel and, as well as Respondent's Louisiana counsel.

Subsequently, on November 2, 1990, on the *ex parte* motion of the *Respondent,* the trial on the merits and corresponding pre-trial "cut-offs" were postponed. In support of its "Ex Parte Motion for Extension," Respondent represented as follows:

> (2) A substantial portion of discovery has been completed, including plaintiff's deposition, *the corporate deposition of Pitman,* and *plaintiff's response to an extensive discovery request from Pitman;*
>
> (3) *Despite the diligent effort of counsel for plaintiff* and defendant, the remaining discovery cannot be completed with the deadlines set . . .

Thus, it was indeed the respondent who sought delay and postponement of discovery.

Subsequently, the originally designated trial judge in the

United States District Court for the Western District of North Carolina, Asheville Division, was recused, *sua sponte*. Thereafter, on February 27, 1991, this action was transferred from the Asheville Division to the Charlotte Division of the Western District of North Carolina.

Despite the passage of over eleven months since Petitioner's claims had been transferred to North Carolina, *Respondent delayed until June 3, 1991,* before challenging Petitioner's procedural capacity to sue on behalf of her son's estate under North Carolina Law.[3] Petitioner urged the District Court to recognize "the Estate of John Ray Janeau" (which Petitioner had been duly appointed to represent in Louisiana, where this action was commenced) as a "juridical person" having proper capacity to sue under Louisiana law. While such dispositive motions remained pending and under advisement, it was deemed prudent to postpone discovery which would potentially require the duplication of expensive travel for both Petitioner's and Respondent's counsel from Louisiana to North Carolina. Approximately five months later, the District Court ruled that Petitioner must qualify as the personal representative of her son's estate under North Carolina law in order to proceed with the claims which had been transferred, for the "convenience" of the parties, from the United States District Court for the Eastern District of Louisiana. In accordance with the letter of the District Court's October 25, 1991 ruling, Petitioner obtained timely and proper qualification as the personal representative of her son's estate in compliance with North Carolina law. According to the Fourth Circuit panel below, on December 3, 1991, on Respondent's motion, the District Court "dismissed the instant case for failure to comply with [the Order of October 25, 1991] in a timely fashion."[4] However, the District

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3. *See* Appendix B, page 6a.

4. *See* Appendix B, page 7a.

Court subsequently recinded its order of dismissal because the Order of October 25, 1991 neither required, nor suggested, that the court must receive special notification of Petitioner's timely compliance with North Carolina's qualification requirements. Thus, because the October 25, 1991 Order contained no "Court notification" requirement, *a fortiori*, no "Court notification" time limit could conceivably have been violated by *Petitioner's counsel.*

Thereafter, on December 30, 1991, Petitioner timely amended her complaint as instructed by the District Court. Less than five months later, in the course of ongoing discovery, indicative of the active prosecution of Petitioner's claims, this matter was erroneously dismissed with prejudice.

REASONS FOR GRANTING THE WRIT

I.

THE EXERCISE OF THIS COURT'S SUPERVISION IS WARRANTED TO CORRECT THE ERRONEOUS RULINGS BELOW WHICH CONTRAVENE THE LONGSTANDING JUDICIAL POLICY FAVORING CASE DISPOSITION ON THE MERITS.

The dismissal of Petitioner's claims, with prejudice, offends the fundamental precepts of our United States judicial system. The Fourth Circuit panel below erroneously declined to reverse the District Court's dismissal although: (A) less than five months earlier, the Petitioner's complaint had been timely amended in accordance with the District Court's instructions; (B) Petitioner had been represented by counsel throughout seven "fact witness" depositions conducted during the month prior to the judgment from which this appeal arose; and (C) over forty-five days remained for further discovery under the District Court's "scheduling order."

As heretofore universally recognized among the Circuit Courts of Appeals, "since dismissal is among the harsher sanctions and contravenes the longstanding policy favoring dispositions on the merits, it must be cautiously invoked." *See Velazquez-Rivera v. Sealand Services, Inc.*, 920 F.2d 1072 (1st Cir. 1990). The May 14, 1992 dismissal herein ignores the active prosecution of Petitioner's claims including the considerable expense and effort of seven "fact witness" depositions *during May 1992*, at a juncture when the pleadings could yet be amended, additional parties could be joined, and an additional forty-five days remained for the completion of discovery. Accordingly, the *per curiam*, below, signals such a drastic departure from the accepted and usual course of judicial proceedings as to warrant the exercise of this Honorable Court's supervisory review.

As the record below clearly reflects, Respondent maintained its original counsel whose offices in New Orleans, Louisiana, are over six hundred miles from the transferee District Court. Consequently, as discussed with Respondent's counsel on numerous occasions, during the lengthy period when the joinder and "capacity" of the parties had been taken under advisement by the District Court on dispositive motions, it was deemed prudent *by both parties* to postpone discovery. Once the joinder and procedural capacity issues had been resolved, and the Petitioner's complaint was amended to the satisfaction of the District Court, the continued earnest efforts of Petitioner's counsel in scheduling and conducting discovery is evidenced in the completion of fact witness depositions taken during the month prior to dismissal.

II.

BY AFFIRMING DISMISSAL WITHOUT THE SLIGHTEST INQUIRY AS TO "THE DEGREE OF PERSONAL RESPONSIBILITY OF THE PLAINTIFF" THE DECISION BELOW CREATES A CONFLICT AMONG THE CIRCUITS.

Because the record was entirely devoid of "delay or contumacious conduct by the plaintiff" and the District Court failed to inquire or determine whether the Petitioner was privy to any "dilatory conduct," the holding below is directly at odds with the settled authorities among other Circuits.

There is no basis whatsoever for the statement by the Fourth Circuit panel, below, that "Janeau has taken little action to prosecute her claim or to respond to Court orders and defense requests." (*See* App. p. 10a). Indeed, the procedural history of this action does not reflect a single instance of deliberate delay by Respondent's counsel. Consequently, the Fourth Circuit panel's Per Curiam Opinion herein is in blatant conflict with numerous long respected prior decisions among the United States Courts of Appeals, including the Fourth Circuit.

In *Dove v. Codesco,* 569 F.2d 811 (4th Cir. 1978), the Fourth Circuit embraced the reasoning set forth in *Durham v. Florida East Coast Ry. Co.*, 385 F.2d 366 (5th Cir. 1967), and emphasized that:

> Indeed, it has been the view of this and other Courts of Appeals that the dismissal power should be exercised "only on the face of a clear record of delay or contumacious conduct *by the plaintiff.*"

See Dove, 569 F.2d at pg. 810. The *Dove* court based its holding on

this Honorable Court's decision in *Link v. Waubash Railroad Co.*, 370 U.S. 626, 82 S. Ct. 1386, 8 L. Ed. 2d 734 (1962) in which the "plaintiff's dilatoriness in prosecuting the case was well documented." *Dove*, at pg. 810. In contrast to the procedural history confronted by this Court, divided 4-3 in *Link*, in which "at the time of the scheduled pre-trial conference, the action had been pending on the District Court's docket for six years," the record in the instant case certainly reflects no deliberate delay by the Petitioner, Mrs. Janeau.

The Per Curiam Opinion by the panel below reflects a vast departure from previous Fourth Circuit authorities which had been in harmony with the various Circuit Courts of Appeals. In *Garland v. Peebles*, the Eighth Circuit recently reiterated its requirement that "a dismissal for failure to prosecute is proper when there has been a 'clear record of delay or contumacious conduct *by the plaintiff.*' " *See Garland v. Peebles*, 1 F.3d 683 (8th Cir. 1993) *citing Brown v. Frey*, 806 F.2d 801 (8th Cir. 1986). In *Garland*, the Eighth Circuit upheld dismissal where the record demonstrated that the Plaintiff, herself had personally "engaged in conduct that prevented this case from going to trial. She created an ethical conflict that forced her attorneys to request to withdraw from her case." *See Garland*, 1 F.3d at pg. 686. Moreover, the Eighth Circuit in *Garland*, emphasized that the District Court had personally conferred directly with the Plaintiff, had "begun the conference by explaining certain ground rules", and had thereby directly determined the basis for delay.

Likewise, the Seventh Circuit recognizes the particular relevance of the Plaintiff's "privity" to, or direct responsibility for, delays warranting dismissal. In *Lucien v. Breweur*, __ F.3d __, 1993 Westlaw 437482 (7th Cir. Oct. 29, 1993), the Seventh Circuit recognized that:

> The misfeasant, moreover, was the party

> himself, not any lawyer, so it is not a case of punishing the client for his lawyer's failures.

Lucien v. Breweur, 1993 Westlaw 437482 (7th Cir. 1993). Moreover, in *Lucien,* the Seventh Circuit, citing *Callip v. Harris County Child Welfare Department,* 757 F.2d 1513, 1518-19 (5th Cir. 1985) observed that "the criteria for sanctions under Rules 16(f), 37(b) and 41(b) are the same."

Consequently, irrespective of which Federal Rule of Civil Procedure is cited, the Plaintiff and his or her counsel provide the only two alternative sources for a "failure to prosecute". Petitioner respectfully submits that there is an important significance in the Appellate Courts' choice of terms, and that the importance of such "phraseology" rises to the level of substance, rather than mere semantics. Were it unnecessary for a Court which perceived a "failure to prosecute" to inquire and determine whether the Plaintiff, as distinguished from his counsel, was directly responsible for, (or at least privy to) such failure, the well settled authorities would hold that:

> Dismissal for failure to prosecute is proper when there has been a clear record of delay or contumacious conduct.

Or . . .

> Dismissal for failure to prosecute is proper when there has been a clear record of delay or contumacious conduct by the plaintiff, *and/or plaintiff's counsel.*

Thus, according to previous Fourth Circuit holdings, in reviewing dismissal under F.R.C.P. Rule 41(b), *a court must ascertain (1) the degree of personal responsibility of the plaintiff,* (2) the amount of

prejudice caused the defendant, (3) the existence of "a drawn out history of deliberately proceeding in a dilatory fashion," and (4) the existence of a sanction less drastic than dismissal. *Davis v. Williams,* 588 F.2d 69, 70 (4th Cir. 1978); *Ramsay v. Bailey,* 531 F.2d 706 (5th Cir. 1976), *cert. denied,* 429 U.S. 1107, 97 S. Ct. 1139, 51 L. Ed. 2d 557 (1977).

In *Davis,* a prison inmate brought action against prison officials alleging that he had been denied essential medical treatment for a hip injury received before his incarceration. The District Court entered judgment dismissing the action for failure to prosecute, and the inmate appealed. The Fourth Circuit held that the District Court did not abuse its discretion in dismissing for failure to prosecute, reasoning that the prison inmate, having been given assurances of adequate medical treatment, was personally responsible for delaying his case. Specifically, the prison inmate himself had refused to cooperate with doctors and the officials who were attempting to arrange treatment for his injury. Additionally, after agreement between the parties that the prison inmate in *Davis* would undergo surgery by a surgeon of his choice, the inmate, himself, failed to make arrangements for the surgery. Thus, having found the prison inmate personally responsible for the delay, the Fourth Circuit upheld the District Court's judgment dismissing the action with prejudice.

In determining whether to dismiss a case, Courts of Appeals recognize that dismissal with prejudice should be ordered under Rule 41(b) "only in the face of a clear record of delay or contumacious conduct by the plaintiff." *Dove v. Codesco,* 569 F.2d 807, 810 (4th Cir. 1978); *Durham v. Florida East Coast Railway Co.,* 385 F.2d 366, 368 (5th Cir. 1967); *Gill v. Stolow,* 240 F.2d 669, 670 (2d Cir. 1957); *see also Mitchell v. Beaubouef,* 581 F.2d 412 (5th Cir. 1978); *cert. denied,* 441 U.S. 966, 99 S. Ct. 2416, 60 L. Ed. 2d 1072 (1979); *Moore v. St. Louis Music Supply Co., Inc.,* 539 F.2d 1191, 1193 (8th Cir. 1976); *Finley v. Parvin/Dohrmann Co.,*

Inc., 520 F.2d 386, 391 (2d Cir. 1975); *Syracuse Broadcasting Corp. v. Newhouse*, 271 F.2d 910, 914 (2d Cir. 1959).

The Fifth Circuit jurisprudence is exemplified by *Connolly v. Papachristid Shipping Ltd.*, 504 F.2d 917 (5th Cir. 1974) where it was determined that the District Court abused its discretion in dismissing Plaintiff's claim. In *Connolly* a foreign national seaman's suit under the Jones Act was dismissed for failure to prosecute. Plaintiff, who was in the British West Indies, had received a notice from the District Court, ordering him to find new local counsel. Despite Plaintiff's inability to timely comply with the Court's order, the *Connolly* Court held that Plaintiff had made substantial efforts to comply with the Court's order and that Plaintiff's conduct did not rise to such contumacious and vexatious delay as to justify dismissal of a possibly meritorious claim.

In *Ramsay*, the Fifth Circuit held that the District Court's dismissal with prejudice for want of prosecution was justified. Plaintiff was proceeding *pro se* against defendants who were allegedly involved in bringing about Plaintiff's commitment to a mental institution. The trial court had issued repeated explicit warnings that Rule 41(b) dismissal would result from Plaintiff's continued failure to proceed. In finding the *Ramsay* Plaintiff personally responsible for the delays in failing to prosecute, the Fifth Circuit upheld the District Court's Rule 41(b) dismissal.

Ramsay, however, is distinguishable from the present case. In *Ramsay*, the Plaintiff was fully and repeatedly apprised of the possible imposition of the Rule 41(b) dismissal. On the present record, Mrs. Janeau was never aware of the possible imposition of such a "terminal" sanction, where the prior dismissal was premised on Petitioner's procedural capacity which in no way reflected delay or contempt.

In the present case, the record is void of any inquiry by the

District Court into the first and foremost consideration — "the degree of personal responsibility or involvement of Plaintiff." This issue was specifically addressed by the Fourth Circuit panel in its questions to counsel, yet Mrs. Janeau's "personal responsibility" was not treated in the *per curiam*. By failing to consider the degree of personal responsibility of the Petitioner, despite the controlling decision of *Davis v. Williams, supra*, the District Court misapplied the mandatory first step of the *Davis* test to determine the propriety of dismissal under Rule 41(b). By affirming the dismissal of Petitioner's suit, absent even the slightest inquiry by the District Court into the Plaintiff's degree of personal responsibility, the Fourth Circuit has rendered a decision in glaring conflict with the decisions of other United States Court of Appeals on the same matter. Therefore, in accordance with the Rules of the Supreme Court of the United States, Petitioner respectfully urges this Honorable Court to exercise its discretion to review the holding of the United States Fourth Circuit Court of Appeals, below, by granting its Writ of Certiorari to correct this dangerously erroneous opinion.

III.

BECAUSE EXPERT TESTIMONY IS NOT ABSOLUTELY ESSENTIAL TO ESTABLISH A *PRIMA FACIE* CASE IN A DEFECTIVE PRODUCT ACTION, THE DECISION BELOW IS FUNDAMENTALLY OFFENSIVE TO THE HOLDINGS OF THIS COURT AND LEGITIMATE CONCERNS OVER RISING LITIGATION COSTS.

Although the Respondent did not argue that the trial on the merits would somehow be impeded or more costly if the Petitioner prosecuted her claims based only on fact testimony, the trial court nonetheless declined to impose the more "fitting" and less harsh sanction suggested by opposing counsel.

The danger implicit in the decision of the panel, below, is substantial when viewed upon the backdrop of ever-increasing litigation costs which are, in many instances, stifling. Rule 702 of the Federal Rules of Evidence which "enables" expert witnesses to testify "in the form of an opinion or otherwise" is prefaced upon the following *proviso:*

> *IF* scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue . . .

See Rule 702, Federal Rules of Evidence. Where, in view of Petitioner's active prosecution of her claims, the appropriate "sanction" would have been to preclude expert testimony, the District Court's dismissal signals that, irrespective of whether the trier of fact will require assistance "to understand the evidence or to determine a fact in issue", expert testimony has now become indispensable to establish a *prima facie* case in a defective product action litigated in the Fourth Circuit's jurisdiction.

Consequently, the Fourth Circuit's holding, below, does not comport with the fundamental principles of the Federal Rules of Civil Procedure and cannot stand in harmony with decisions of other United States Courts of Appeals and of this Court. Moreover, by requiring expert testimony as a mandatory prerequisite to every "products liability" action, the Fourth Circuit has apparently abandoned the requirement that the subject "must be so distinctly related to some science, profession, business or occupation as to be beyond the understanding of the average layman." *See Webb v. Fuller Brush Company,* 378 F.2d 500 (3d Cir. 1967), *McCormick on Evidence,* §§ 12, 13 (1972) and *State v. Wheeler,* 416 S.2d 78 (La. 1982). In the instant case, the eyewitness testimony of the decedent's co-workers who were on the jobsite when Petitioner's son was electrocuted provided sufficient deposition testimony

from which laymen would be capable of concluding that the crane manufactured by Respondent was defective. Thus, because jurors of common understanding would be capable of forming a judgment concerning the ultimate issue of fact in the case *sub judice*, the use of expert testimony is neither required, nor favored. *See Salem v. U.S. Lines Company*, 370 U.S. 31, 82 S. Ct. 1119 (1962). Because all primary facts in the instant case can be intelligibly described to a jury by eyewitnesses, and jurors of common understanding are capable of comprehending such facts and drawing the correct conclusions from them, expert testimony is unnecessary and should be properly excluded. *Id.* Inasmuch as the Fourth Circuit's decision, herein, seriously departs from the prior holding of this Honorable Court, Petitioner respectfully maintains that supervisory review is warranted and should be exercised.

CONCLUSION

The importance of granting Certiorari in this case cannot be overstated. The misapplication of prior case law, both in the previous pronouncements of this Court and the lower federal courts, threatens any expectation of consistency in application of federal procedure where the Courts' power of dismissal is sought to be invoked. Such a dismal result need not occur if this Court will articulate a uniform rule requiring that a District Court may exercise its discretionary dismissal powers *only* where there has been appropriate inquiry, and a threshold degree of personal responsibility of the plaintiff has been ascertained. Moreover, supervisory review is also appropriate in order to underscore this Court's previous warnings against the superfluous use of expert testimony.

Accordingly, this Court should grant a Writ of Certiorari.

Respectfully submitted,

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APPENDIX A — DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT FILED AUGUST 24, 1993

FILED
August 24, 1993

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 92-1923
CA-90-194-C-C-V

BRENDA JANEAU

Plaintiff-Appellant

v.

PITMAN MANUFACTURING COMPANY, INCORPORATED

Defendant-Appellee

and

DUKE POWER COMPANY; B&D CONTRACTORS, INCORPORATED

Defendants

On Petition for Rehearing with Suggestion for Rehearing In Banc

The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

Appendix A

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

For the Court,

/s/ Bert M. Montague
CLERK

APPENDIX B — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT DECIDED JULY 27, 1993

UNPUBLISHED
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 92-1923

BRENDA JANEAU,

Plaintiff-Appellant,

v.

PITMAN MANUFACTURING COMPANY, INCORPORATED,

Defendant-Appellee,

and

DUKE POWER COMPANY; B&D CONTRACTORS, INCORPORATED,

Defendants.

Appeal from the United States District Court
for the Western District of North Carolina, at Asheville.
Richard L. Voorhees, Chief District Judge.
(CA-90-194-C-C-V)

Argued: May 5, 1993

Decided: July 27, 1993

Before PHILLIPS and MURNAGHAN, Circuit Judges, and BUTZNER, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

Appendix B

COUNSEL

ARGUED: Michael P. Wilty, KEATY & KEATY, Lafayette, Louisiana, for Appellant. Francis Horatio Brown, III, LEMLE & KELLEHER, New Orleans, Louisiana, for Appellee. ON BRIEF; Robert B. Keaty, Eugene P. Redman, KEATY & KEATY, Lafayette, Louisiana, for Appellant. George Frazier, LEMLE & KELLEHER, New Orleans, Louisiana, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6.

OPINION

PER CURIAM:

Brenda Janeau brought a products liability claim on behalf of her son's estate against Pitman Manufacturing Company which manufactured the heavy crane her son was operating when he died. Janeau was cited several times for delay and failure to respond to defense requests and court orders. The district court threatened to sanction Janeau and twice dismissed her case. The second dismissal was with prejudice and was based on Fed. R. Civ. P. 16(f) (failure to obey scheduling or pretrial order), Fed. R. Civ. P. 37(b)(2)(C) (failure to obey an order to permit or provide discovery), and Fed. R. Civ. P. 41(b) (failure to prosecute or to comply with the rules or any order of the court). Janeau has appealed the district court's dismissal.

On December 5, 1988, John Ray Janeau, then an employee of Southeastern Boring Contractors and a resident of North Carolina, was electrocuted in a fatal construction site accident in Charlotte, North Carolina. At the time of the accident, John Ray Janeau was

operating a truck-mounted crane manufactured by Pitman Manufacturing Company, a Pennsylvania corporation, at a job site maintained and managed by B&D Contractors, a North Carolina corporation, which had subcontracted a portion of the work to Southeastern. The crane came into contact with an energized power line owned and maintained by Duke Power Company, a North Carolina corporation. John Ray Janeau was electrocuted and killed instantly.

On November 2, 1989, John Ray Janeau's mother, Brenda Janeau, was appointed provisional administratrix of the "Succession of John Ray Janeau" by the 25th Judicial District Court for the Parish of Plaquemines, Louisiana, where she resided. She commenced the present wrongful death action against Pitman in the Civil District Court for the Parish of New Orleans, Louisiana, on November 29, 1989. Her claim was predicated on the theory that the crane had design or manufacturing defects and that Pitman had a duty to warn of such hazards and dangers.

Pitman filed a notice of removal on January 4, 1990, thereby removing the case to the United States District Court for the Eastern District of Louisiana. After some preliminary discovery, the case was transferred on June 20, 1990, to the United States District Court for the Western District of North Carolina, Charlotte Division, upon Pitman's motion.

Six months after the case was transferred to North Carolina, Brenda Janeau first communicated with the district court in Charlotte. Without offering any explanation for the delay, she moved to amend her complaint so as to name Duke Power and B&D Contractors as co-defendants, alleging for the first time that those parties were "liable to plaintiff jointly, severally, and in *solido* with each other and defendant, Pitman." Leave to file the

amended complaint was granted on December 12, 1990. Subsequently, on February 27, 1991, the case was transferred to the Asheville Division, because of a potential conflict of interest in Charlotte.

Although added as co-defendants in December 1990, neither Duke nor B&D was served by Janeau until March 25, 1991, again without explanation for the delay. In their responsive pleadings filed on April 16, 1991, Duke and B&D raised the issue of absence of diversity jurisdiction and Janeau's incapacity to sue because of her failure to qualify properly under North Carolina law as a personal representative of her son's estate. On June 3, 1991, Pitman moved to dismiss the suit on the latter ground.

On October 25, 1991, after considering oral arguments and voluminous briefs, the district court dismissed the case as to Duke and B&D for lack of diversity jurisdiction,* and afforded Janeau thirty days, or until November 27, within which to seek proper qualification as the personal representative of her son's estate and to inform the court of such qualification. The district court specifically stated in its opinion and order that Janeau's failure to qualify within thirty days would result in the dismissal of her claims against Pitman.

---

* The only basis for the district court's jurisdiction in the present case was complete diversity of citizenship between the plaintiff and the defendants, as provided for in 28 U.S.C. § 1332. Under the 1988 amendments to § 1332, "the legal representative of the estate of a decedent shall be deemed to be a citizen only of the same State as the decedent." 28 U.S.C. § 1332(c)(2). The new provision applies to any civil action commenced in or removed to a United States District Court after May 18, 1989. Since Janeau's suit was removed to federal court on January 4, 1990, the 1988 amendments are controlling. Accordingly, she was deemed to be, in her capacity as administratix, a citizen of North Carolina and was not in diversity of citizenship with Duke & B&D, both North Carolina corporations.

Appendix B

As of December 3, 1991, a date after which those thirty days had expired, the district court had received no notice that Janeau had qualified; therefore, upon Pitman's motion, it dismissed the instant case for failure to comply with an order of the court in a timely fashion. Eight days later, Janeau filed a motion for reconsideration, informing the court that she had indeed qualified as a personal representative prior to the November 27 deadline but had failed to notify the court of her qualification. The district court rescinded its order of dismissal on December 19, 1991, but repeated its warning of dismissal and other sanctions for further transgressions by counsel, and permitted the case to go forward upon filing of an amended complaint.

Janeau filed her third amended complaint on December 30, 1991. Pitman filed a motion for scheduling order on February 19, 1992, which the trial court later granted when Janeau failed to respond. Janeau never notified the trial court of any objections to or difficulties with the discovery schedule or proposed an alternative schedule. Janeau neither disclosed any witnesses — fact or expert — nor provided Pitman with expert reports by April 15, 1992, as required by scheduling order. Accordingly, on April 21, 1992, Pitman filed a motion to dismiss or alternatively to exclude expert testimony. Janeau did not respond. On May 7, 1992, the trial court dismissed the action with prejudice under Fed. R. Civ. P. 16(f), 37(b), and 41(b). The trial court stated that the dismissal was based on the failure by Janeau's counsel either to comply with the scheduling order, to make or cooperate in discovery, to prosecute the action, or to comply with any order.

For the first time since filing her third amended complaint in December 1991, Janeau communicated with the district court on May 22, 1992, when she filed a motion for reconsideration of the May 7, 1992 dismissal. Because Janeau's motion was filed within

ten days of the entry of judgment, the trial court treated it as a motion to alter or amend a judgment under Fed. R. Civ. P. 59(e). The trial court denied Janeau's motion for reconsideration for the following reasons:

> (1) There were at least two flagrant violations of the pretrial order by plaintiff, two violations of other orders entered by the trial court, six months of unexplained delay in moving to add Duke and B&D as co-defendants, nearly four months of unexplained delay in serving Duke and B&D, eight months of delay resulting from Janeau's lack of capacity to sue, and two dismissals.
>
> (2) Janeau never offered any explanation for her failure to respond to Pitman's motions of December 2, 1991, February 19, 1992, and April 21, 1992; to comply with the trial court's orders of October 25, 1991, and March 3, 1992; or to meet the April 15, 1992, discovery deadline.
>
> (3) No depositions had been taken from at least December 1990 to February 1992.
>
> (4) Janeau had yet to name any proposed expert witness or identify any alleged defect in Pitman's crane.

In summation, the district court concluded that the case was "no closer to trial readiness now than it was on the day the initial complaint was filed." Accordingly, the district court affirmed its

earlier dismissal with prejudice. The district judge believed that less drastic sanctions would be

> grossly inadequate and inappropriate in light of the lackadaisical prosecution of the instant case . . . Any perpetuation of the case would merely compound the prejudice already suffered by Defendant, in that Defendant would still be required to prepare a defense against some illusory allegation of negligence that two and one-half years of procedural antics and discovery shenanigans have failed to resolve . . . One would be hard pressed to argue that a less drastic sanction would be appropriate where the ultimate sanction of dismissal has already failed.

We review the district court's dismissal pursuant to Fed. R. Civ. P. 41(b) for an abuse of discretion. *See Davis v. Williams*, 588 F.2d 69, 70 (4th Cir. 1978); *see also Herbert v. Saffell*, 877 F.2d 267 (4th Cir. 1989). Specifically, we examine the lower court's ruling to see whether the district judge appropriately considered the four factors which govern a Fed. R. Civ. P. 41(b) dismissal:

> (1) the degree of personal responsibility of the plaintiff, (2) the amount of prejudice caused the defendant, (3) the existence of a "drawn out history of deliberately proceeding in a dilatory fashion", and (4) the existence of sanctions less drastic than dismissal.

Chandler Leasing Corporation v. Lopez, 669 F.2d 919, 920 (4th Cir. 1982) (quoting *Davis*, 588 F.2d at 70); *accord Herbert*, 877 F.2d at 270.

Appendix B

The district court thoroughly appraised each of the factors, finding only the first factor — personal responsibility of the plaintiff — in doubt. We find that the district court properly concluded that prejudice to the defendant, Pitman, is significant as evidenced by the fact that it repeatedly has been forced to file motions based on the failure of plaintiff to respond to court orders.

Moreover, the record reveals an obvious pattern of deliberate dilatory action on the part of Janeau's attorneys. Over the course of the two and one-half years since she filed suit against Pitman, Janeau has taken little action to prosecute her claim or to respond to court order and defense requests. Her claim against Pitman has been dismissed *twice* due to her counsel's failure to respond to court orders and to reply to defense motions. Finally, no lesser sanction would seem effective in the present case; indeed, Janeau was undeterred by an earlier dismissal.

While dismissal with prejudice is a "harsh sanction which should not be invoked lightly," *Davis*, 588 F.2d at 70, it properly was invoked in the present case. Therefore, the district court's order dismissing with prejudice Janeau's claims against Pitman is

AFFIRMED.

APPENDIX C —JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NORTH CAROLINA, CHARLOTTE DIVISION, FILED MAY 14, 1992

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

CIVIL NO. C-C-90-194-V

BRENDA JANEAU,

Plaintiff,

vs.

PITMAN MANUFACTURING COMPANY, INC.,

Defendant.

JUDGMENT

For the reasons stated in the Order of Dismissal filed May 7, 1992,

IT IS ORDERED, ADJUDGED, AND DECREED that Defendant's Motion to Dismiss and/or Alternatively to Strike Plaintiff's Use of Experts at the Trial of this Matter is ALLOWED and this case is hereby DISMISSED WITH PREJUDICE.

THIS the 14th day of May, 1992.

s/ Richard L. Voorhees
RICHARD L. VOORHEES, CHIEF JUDGE
UNITED STATES DISTRICT COURT

APPENDIX D — ORDER OF DISMISSAL OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NORTH CAROLINA, CHARLOTTE DIVISION FILED MAY 7, 1992

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

CIVIL NO. C-C-90-194-V

BRENDA JANEAU,

Plaintiff,

vs.

PITMAN MANUFACTURING COMPANY, INC.,

Defendant.

ORDER OF DISMISSAL

THIS MATTER is before the Court on Defendant's "Motion to Dismiss and/or Alternatively to Strike Plaintiff's Use of Experts at the Trial of this Matter" and memorandum in support thereof, filed April 21, 1992. For the reasons stated herein, Defendant's motion to dismiss shall be allowed.

The captioned civil matter has floundered in the court systems of Louisiana and North Carolina for nearly two and one-half years, and is no closer to trial readiness now than it was on the day the initial complaint was filed. The factual background of this case is set forth in an earlier decision by this Court, and will not be repeated herein. *See* Memorandum of Opinion and Order, filed October 25, 1991 (Pleading No. 39) ["Opinion"]. However, the Court will recount the procedural history of this case.

Appendix D

Plaintiff, the mother of the decedent, originally instituted this wrongful death action against the Defendant in the Civil District Court for the Parish of Orleans, State of Louisiana, on November 29, 1989. Defendant, a Pennsylvania corporation with its principal place of business in Pennsylvania, filed a notice of removal on January 4, 1990 thereby removing this case to the United States District Court for the Eastern District of Louisiana. On June 20, 1990, the case was transferred to the United States District Court for the Western District of North Carolina, Charlotte Division. On December 6, 1990, Plaintiff moved to amend her complaint so as to add two "jointly liable" defendants, Duke Power Company ["Duke"] and B & D Contractors of Shelby, Inc. ["B & D"], both being North Carolina corporations with their principal places of business in North Carolina. Leave was granted by U.S. District Court Judge Graham C. Mullen for the filing of the amended complaint on December 12, 1990. The case was transferred to this Court on February 27, 1991, when a potential conflict of interest arose in the Charlotte Division.

On October 25, 1991, the Court found that Plaintiff lacked the capacity to sue Defendant in the instant case due to her failure to qualify properly as a personal representative of the decedent's estate under North Carolina law. *See* Opinion.[1] However, the Court afforded Plaintiff thirty days, or until November 27, 1991, within which to properly qualify as a personal representative of decedent's estate. *Id.* at 24.[2] Plaintiff's apparent failure to comply

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1. The Court also ruled that, because Plaintiff had to be considered a North Carolina resident for purposes of diversity jurisdiction, *see* 28 U.S.C. § 1332(c)(2), all claims against Duke and B & D had to be dismissed for lack of diversity jurisdiction. *See* Opinion at 14-16.

2. This additional thirty-day period for qualification was permitted even though "counsel for the Plaintiff was first notified of the question of Plaintiff's

(Cont'd)

with the Court's Opinion in a timely fashion resulted in the dismissal of Plaintiff's Claims. Order of Dismissal, filed December 4, 1991 (Pleading No. 41). Upon subsequent motion by the Plaintiff, the Court rescinded its dismissal order on December 19, 1991, and permitted the case to go forward upon filing of an amended complaint by the Plaintiff.[3] Order at 2, filed December 19, 1991 (Pleading No. 44).

Since filing its amended complaint on December 30, 1991, Plaintiff has filed no pleadings in the instant case, and has apparently failed to participate in the discovery process. For example, the Court waited 13 days for Plaintiff's response to Defendant's motion for a discovery scheduling order.[4] When no response was forthcoming, the Court entered the requested scheduling order. *See* Order, filed March 3, 1992 (Pleading No. 51). Plaintiff's failure to comply with the first deadline set forth in

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(Cont'd)
capacity to sue on or about April 18, 1991, approximately six months prior to the Court's Opinion requiring Plaintiff to qualify as an ancillary administrator under North Carolina law within the ensuing thirty days." Order at 2, filed December 19, 1991 (Pleading No. 44).

3. The Court found that, although Plaintiff had indeed timely qualified as a personal representative of the decedent's estate, counsel for the Plaintif failed to notify the Court of such qualification until two weeks after the Court-imposed deadline for qualification and one week after the Court's dismissal of the case for failure to timely qualify. *See* Order, filed December 19, 1991 (Pleading No. 44).

4. Defendant experienced the same failure to respond when it suggested a consensual discovery schedule to counsel for the Plaintiff. *See* Pitman Manufacturing Company, Inc.'s Motion for Scheduling Order, filed February 19, 1992 (Pleading No. 49) ("Pitman has sought plaintiff's input in establishing a Joint Motion for Scheduling Order, but received no response from plaintiff's counsel.").

that Order[5] prompted the motion to dismiss considered herein. Fifteen days have passed since the filing of Defendant's motion to dismiss, and Plaintiff has yet to respond to the pending motion. Plaintiff has also failed to respond or object to any of the numerous notices for deposition filed by the Defendant since December 30, 1991. *See* Notice of Deposition, filed February 4, 1992 (Pleading No. 48); Notice of Rule 30(b)(6) Deposition of B & D Contractors, Inc., filed April 28, 1992 (Pleading No. 54); Notice of Deposition, filed April 28, 1992 (Pleading No. 55); Notice of Rule 30(b)(6) Deposition of Duke Power, filed April 28, 1992 (Pleading No. 56); Notice of Deposition, filed April 28, 1992 (Pleading Nos. 57, 58, 59, 60).

The history of dilatory practices displayed by counsel for the Plaintiff leaves this Court with no reasonable alternative but dismissal of this cause of action. The resurrection of this case after one dismissal should have purged this matter of any further procrastination by any party. Obviously, the mere threat of dismissal has not had this effect. *See* Order at 4, filed December 19, 1991 (Pleading No. 44) (warning counsel that failure to file a timely amended complaint "shall result" in dismissal). Therefore, based on the failure by counsel for the Plaintiff either to comply with the scheduling order or to make or cooperate in discovery, the Court shall invoke Fed. R. Civ. P. 16(f) and 37(b) and dismiss all claims against the Defendant. The Court shall also dismiss this case "[f]or failure of the plaintiff to prosecute [and] to comply with these rules [and] any order of court," which "operates as an adjudication upon the merits." Fed. R. Civ. P. 41(b).

---

5. To date, Plaintiff has not complied with the following provision of the scheduling order: "Deadline for Plaintiff to disclose all fact and expert witnesses and to provide Defendant with expert reports — April 15, 1992." Order, filed March 3, 1992 (Pleading No. 51).

Appendix D

IT IS, THEREFORE, ORDERED that Defendant's Motion to Dismiss and/or Alternatively to Strike Plaintiff's Use of Experts at the Trial of this Matter is hereby ALLOWED, and all claims against Defendant Pitman Manufacturing Company, Inc., contained in the captioned civil matter are hereby DISMISSED WITH PREJUDICE.

THIS the 7th day of May, 1992.

s/ Richard L. Voorhees
RICHARD L. VOORHEES, CHIEF JUDGE
UNITED STATES DISTRICT COURT

APPENDIX E — SCHEDULING ORDER ENTERED BY THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NORTH CAROLINA, CHARLOTTE DIVISION FILED MARCH 3, 1992

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

CIVIL DOCKET NO. C-C-90-194-V

BRENDA JANEAU,

Plaintiff,

vs.

PITMAN MANUFACTURING COMPANY, INC.,

Defendant.

ORDER

THIS MATTER is before the Court on Defendant's motion for a scheduling order in the captioned civil matter.

For the reasons stated in Defendant's motion and supporting memorandum and in accordance with Fed. R. Civ. P. 16 and the Plaintiff having filed no objection, the Court finds that such an order would be appropriate in the instant case and that Defendant's proposed schedule is reasonable.

IT IS THEREFORE ORDERED that the parties in the captioned civil matter shall comply with the following schedule:

1. Deadline for Plaintiff to disclose all fact and expert witnesses and to provide Defendant with expert reports — April 15, 1992;

Appendix E

2. Deadline for Defendant to disclose all fact and expert witnesses and to provide Plaintiff with expert reports — May 15, 1992;

3. Deadline for either party to add parties and to amend pleadings — May 15, 1992; and

4. Deadline for the completion of *all* discovery by all parties — July 1, 1992.

IT IS FURTHER ORDERED that, unless expressly changed herein, the Pretrial Order entered in this matter on July 13, 1990, remains in full force and effect until further order of this Court.

THIS the 3rd day of March, 1992.

s/ Richard L. Voorhees
RICHARD L. VOORHEES, CHIEF JUDGE
UNITED STATES DISTRICT COURT

APPENDIX F — RELEVANT STATUTES

28 U.S.C. § 1254. Courts of Appeals; certiorari; appeal; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

> (1) By writ of certiorari granted upon the petitioner of any party to any civil or criminal case, before or after rendition of judgment or decree;
>
> (2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

28 U.S.C. § 1332. Diversity of citizenship; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $50,000, exclusive of interest and costs, and is between —

> (1) citizens of different States;
>
> (2) citizens of a State and citizens or subjects of a foreign state;

(3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and

(4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

For the purposes of this section, section 1335, and section 1441, an alien admitted to the United States for permanent residence shall be deemed a citizen of the State in which such alien is domiciled.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff who files the case originally in the Federal courts is finally adjudged to be entitled to recover less than the sum or value of $50,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

(c) For the purposes of this section and section 1441 of this title —

(1) a corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business, except that in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-

defendant, such insurer shall be deemed a citizen of the State of which the insured is a citizen, as well as of any State by which the insurer has been incorporated and of the State where it has its principal place of business; and

(2) the legal representative of the estate of a decedent shall be deemed to be a citizen only of the same State as the decedent, and the legal representative of an infant or incompetent shall be deemed to be a citizen only of the same State as the infant or incompetent.

28 U.S.C. § 1291. Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

FILED
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No. 93-819

In The

Supreme Court of the United States

October Term, 1993

BRENDA JANEAU,

Petitioner,

vs.

PITMAN MANUFACTURING COMPANY, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTERSTATEMENT OF QUESTIONS PRESENTED FOR REVIEW

(1) Should this Court grant the Petition to review the factual findings of the District Court for abuse of discretion?

(2) Did the dismissal of the case by the District Court and the subsequent affirmation of that decision by the Fourth Circuit constitute abuses of discretion?

LIST OF PARTIES, PARENTS AND SUBSIDIARIES

The parties to the proceedings below were Petitioner Brenda Janeau and Respondent Pitman Manufacturing Company, Inc.

At the time the crane in question was manufactured, Pitman Manufacturing Company was owned by Emerson Electric Company, which remains responsible for any liability that may result from the incident at issue.

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No. 93-819

In The

Supreme Court of the United States

October Term, 1993

BRENDA JANEAU,

Petitioner,

vs.

PITMAN MANUFACTURING COMPANY, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The Petition presents no ground specified in Rule 10.1 of this Court. The question of law involved in this case has been definitively decided by the Court, the ruling sought to be reviewed is consistent with that decision, and the supposed conflict among the Circuits is illusory. Perhaps more significantly, the questions the Petition professes to present are of Petitioner's own manufacture. The only issues are these: Was the application of well established standards of law to the facts found by the trial court so obviously erroneous that the Court of Appeals abused its discretion by not reversing and remanding for

trial? What policy would be served by a remand that could only result in this case being dismissed by the district court for the third time? Respondent submits the answers are self-evident, and consequently requests that the Court deny the Petition for Writ of Certiorari to Review the Decision of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS AND ORDERS BELOW

Some relevant Opinions and Orders are found in the Appendix to the Petition for Writ of Certiorari. Others are reproduced as Appendices to this Brief. The unreported Order of the Court of Appeals denying the Petition for Rehearing and the Suggestion for Rehearing En Banc is reproduced in Appendix A to the Petition. The unreported Opinion of the United States Court of Appeals for the Fourth Circuit affirming the trial court's Order dismissing Petitioner's case is reproduced in Appendix B to the Petition. The unreported Order of the United States District Court for the Western District of North Carolina dismissing Petitioner's suit for the second time is reproduced in Appendix D to the Petition. The unreported Memorandum of Opinion and Order in which the District Court conditionally dismissed this case until Petitioner filed a supplemental complaint establishing that she had properly qualified as the personal representative of the deceased's estate is attached as Appendix A to this Brief. The unreported Order of the District Court dismissing Petitioner's case for the first time is reproduced in Appendix B to this Brief. The unreported District Court Order granting Petitioner's Motion for Reconsideration of

the first Order dismissing the case is reproduced in Appendix C to this Brief. The unreported Order of the District Court denying Petitioner's Motion for Reconsideration of the second dismissal (the Order of Dismissal from which this case is appealed) is reproduced at Appendix D to this Brief.

JURISDICTION

The Court has jurisdiction under 28 U.S.C. § 1254(1). The Court of Appeals' decision affirming the trial court's dismissal was issued on July 27, 1993. The Order denying rehearing by the panel or en banc was filed on August 24, 1993. The Petition for Certiorari was filed on November 22, 1993.

RULES INVOLVED

The pertinent portions of the Rules relevant to this case are as follows:

1. Federal Rule of Civil Procedure 16(f):

> If a party or party's attorney fails to obey a scheduling or pretrial order, or if no appearance is made on behalf of a party at a scheduling or pretrial conference, or if a party or party's attorney is substantially unprepared to participate in the conference, or if a party or party's attorney fails to participate in good faith, the judge, upon motion or the judge's own initiative, may make such orders with regard thereto as are just, and among others any of the orders provided in Rule 37(b)(2)(B), (C), (D). . . .

2. Federal Rule of Civil Procedure 37(b)(2):

If a party . . . fails to obey an order to provide or permit discovery . . . the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

(A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence;

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party. . . .

3. Federal Rule of Civil Procedure 41(b):

For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against the defendant. Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party

under Rule 19, operates as an adjudication upon the merits.

COUNTERSTATEMENT OF THE CASE

This is a products liability claim under North Carolina law. Petitioner is the personal representative of the estate of her son, who was killed while operating a heavy crane manufactured by Respondent.[1] The Complaint was originally filed in Louisiana state court, removed to the United States District Court for the Eastern District of Louisiana, and transferred to the Charlotte Division of the United States District Court for the Western District of North Carolina. Although the Complaint asserts that Respondent was negligent and its crane defectively designed, Petitioner has never identified the negligence or design defect. Petitioner's conduct in the trial court led to repeated threats of sanctions and two orders of dismissal. Petitioner appeals from the last order, granted under the authority of Federal Rules of Civil Procedure 16(f), 37(b)(2)(C), and 41(b).

COUNTERSTATEMENT OF FACTS

Petitioner has not fairly or accurately recounted the facts and proceedings below. Respondent believes a

[1] Defendant Pitman Manufacturing Company, Inc. is referred to as "Pitman" as well as "Respondent". Plaintiff Brenda Janeau is identified as "Janeau" as well as "Petitioner".

summary of the Opinions and Orders[2] of the trial court offers a more balanced presentation.

1. Background

- On December 5, 1988, John Ray Janeau ("Decedent"), then an employee of Southeastern Boring Contractors, Inc. ("Southeastern"), was electrocuted in a fatal construction site accident in Charlotte, North Carolina.

- While operating a crane manufactured by Pitman, Decedent and the crane came into contact with an energized power line owned and maintained by Duke Power Company ("Duke").

- The accident occurred on a job site maintained and managed by B & D Contractors of Shelby, Inc. ("B & D"), which had subcontracted with Southeastern for a portion of the work.

- Pitman is a Pennsylvania corporation with its principal place of business in Pennsylvania. Both Duke and B & D are North Carolina corporations with their principal places of business in North Carolina.

- On November 2, 1989, Janeau, the mother of the Decedent and a citizen of Louisiana, was appointed provisional administratrix of the "Succession of John Ray

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[2] MEMORANDUM OF OPINION AND ORDER filed October 25, 1991 [Appendix A to this Brief]; ORDER OF DISMISSAL filed December 4, 1991 [Appendix B to this Brief]; ORDER filed December 19, 1991 [Appendix C to this Brief]; ORDER OF DISMISSAL filed May 7, 1992 [Appendix D to the Petition]; ORDER filed June 30, 1992 [Appendix D to this Brief].

Janeau" by the 25th Judicial District Court for the Parish of Plaquemines, Louisiana.

2. The Proceedings Below

- Janeau commenced this wrongful death action against Pitman in the Civil District Court for the Parish of Orleans, State of Louisiana, on November 29, 1989.

- Her claim was predicated on the theory that the crane had unspecified design or manufacturing defects and Pitman had a duty to warn of "hazards and dangers."

- Pitman filed a notice of removal on January 4, 1990, removing the case to the United States District Court for the Eastern District of Louisiana.

- After some preliminary discovery, the case was transferred on June 20, 1990, to the Western District of North Carolina, Charlotte Division, upon Pitman's motion.

- Six months later, Janeau moved to amend her Complaint to name Duke and B & D as co-Defendants, alleging for the first time that those parties were liable jointly, severally, and *in solido* with each other and Pitman.

- Janeau offered no explanation for the delay.

- Leave to file the Amended Complaint was granted on December 12, 1990.

• The case was transferred to Chief Judge Voorhees in Asheville on February 27, 1991, when a potential conflict of interest arose in Charlotte. The Order from which Petitioner seeks review was issued by Judge Voorhees.[3]

• Although added as co-Defendants in December, 1990, neither Duke nor B & D were served until March 25, 1991, again without explanation for the delay.

• In their responsive pleadings, Duke and B & D raised the absence of diversity jurisdiction and Plaintiff's incapacity to sue because of her failure to qualify properly as a personal representative under North Carolina law.

• On June 3, 1991, Pitman moved to dismiss the suit because Janeau had failed to qualify under North Carolina law.

3. The Decisions Below

• On October 25, 1991, the trial court issued an Opinion and Order that (a) dismissed Janeau's case against Duke and B & D for lack of diversity jurisdiction, and (b) afforded Janeau thirty days from the October 25, 1991, filing of the Opinion and Order, or until November 27, 1991, within which "to seek proper qualification as ancillary administrator or personal representative, *to file a*

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[3] The Petition incorrectly states that on February 27, 1991, this action was transferred from the Asheville Division to the Charlotte Division of the Western District of North Carolina. Petition at 5.

supplemental pleading establishing such qualification, and, thereby, to ratify commencement of this action."[4]

- The Opinion and Order twice warned that Janeau's failure to qualify within thirty days of the entry of the Order *"shall result in the dismissal* of Plaintiff's claims against Pitman."[5]

a. The First Dismissal

- The trial court did not receive notice that Janeau had qualified as a personal representative under North Carolina law within the prescribed time.

- Pitman moved for dismissal on December 2, 1991.

- Janeau did not respond.

- The trial court then dismissed the case for failure to comply with its Order of October 25, 1991.[6]

- In a Motion for Reconsideration filed on December 11, 1991, Janeau revealed that she had qualified as a personal representative of the decedent's estate, but had simply failed to notify the court until two weeks after the deadline for qualification and one week after the dismissal of the case for failure to timely qualify.

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[4] MEMORANDUM OF OPINION AND ORDER filed October 25, 1991, at 24 [Appendix A to this Brief at App. 24] (emphasis added).

[5] MEMORANDUM OF OPINION AND ORDER filed October 25, 1991, at 26-27 [Appendix A to this Brief at App. 26-27] (emphasis added).

[6] ORDER OF DISMISSAL filed December 4, 1991 [Appendix B to this Brief at App. 28-29].

- No explanation was offered for Janeau's failure to comply in a timely fashion.

- Nonetheless, the trial court rescinded its first Order of Dismissal on December 19, 1991, repeated its warning of dismissal and other sanctions for further transgressions by counsel, and permitted the case to go forward upon filing of an amended complaint.[7]

- Pitman filed a Motion for Scheduling Order on February 19, 1992.

- The trial court granted the Motion when Janeau failed to respond to the Motion in any way.[8]

- Janeau never notified the trial court of any objections to or difficulties with the discovery schedule or proposed an alternative schedule.

- Janeau neither disclosed any witnesses – either fact or expert – nor provided Pitman with expert reports by April 15, 1992, as required by the Scheduling Order.

- Accordingly, Pitman filed a Motion to Dismiss or alternatively Exclude Expert Testimony on April 21, 1992.

- Janeau did not respond.

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[7] ORDER filed December 19, 1991, at 4-5 [Appendix C to this Brief at App. 34-35]. The court twice referred to sanctions under Rules 11 and 16(f) *in addition* to dismissal.

[8] The trial court even had its law clerk place two telephone calls to counsel for Plaintiff about the Motion for Scheduling Order. Neither call elicited a response. *See* ORDER filed June 30, 1992, at 6 n.5 [Appendix D to this Brief at App. 41].

b. The Second Dismissal

• On May 7, 1992, the trial court dismissed the action with prejudice under Federal Rules of Civil Procedure 16(f), 37(b), and 41(b). The trial court stated that the dismissal was based on the failure by counsel for Janeau to comply with the Scheduling Order, make or cooperate in discovery, prosecute the action, or comply with any order.[9]

• Janeau filed a Motion for Reconsideration on May 22, 1992.

• Because the Motion was filed within ten days of the entry of Judgment, the trial court treated it as a motion to alter or amend a judgment under Rule 59(e).

• The trial court based its denial of Janeau's Motion for Reconsideration on the following:

(i) There were (a) at least two flagrant violations of the Pretrial Order by Janeau,[10] (b) two violations of other Orders entered by the trial court[11], (c) six months of

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[9] ORDER OF DISMISSAL filed May 7, 1992, at 4-5 [Appendix D to the Petition at 15a].

[10] Janeau's first response of any kind to Pitman's Motion for Scheduling Order was its Motion for Reconsideration filed ninety-three days later. Janeau's response to Pitman's second Motion to Dismiss was filed thirty-one days after the Motion and fifteen days after the trial court's second Order of Dismissal.

[11] Janeau failed to file anything establishing that she had properly qualified as a personal representative of Decedent's estate until sixteen days after the deadline set by the Opinion and Order of October 25, 1991, and seven days after the first

unexplained delay in moving to add Duke and B & D as co-Defendants, (d) nearly four months of unexplained delay in serving Duke and B & D, (e) eight months of delay resulting from Janeau's lack of capacity to sue, and (f) two dismissals.[12]

(ii) Janeau never offered an explanation for her failure to (a) respond to Pitman's Motions of December 2, 1991, February 19, 1992, and April 21, 1992, (b) comply with the trial court's Orders of October 25, 1991, and March 3, 1992, or (c) meet the April 15, 1992, discovery deadline.[13]

(iii) No depositions had been taken from at least December, 1990, to February, 1992.[14]

(iv) Janeau had yet to name any proposed expert witness or to identify any alleged defect in Defendant's crane.[15]

Order of Dismissal. Janeau also violated the trial court's March 3, 1992, Order by failing to disclose all fact and expert witnesses and provide Pitman with expert reports by April 15, 1992.

[12] ORDER filed June 30, 1992, at 8-9 [Appendix D to this Brief at App. 43-45].

[13] Indeed, Janeau neither filed pleadings nor communicated with the trial court in any fashion between (a) June 20, 1990 and December 6, 1991 and (b) December 30, 1991 and May 22, 1992. *See* ORDER filed June 30, 1992, at 3 n.3 & 6 [Appendix D to this Brief at App. 38 & 41].

[14] ORDER filed June 30, 1992, at 9 [Appendix D to this Brief at App. 45].

[15] ORDER filed June 30, 1992, at 9-10 [Appendix D to this Brief at App. 45].

(v) The case "is no closer to trial readiness now than it was on the day the initial complaint was filed."[16]

4. Appellate Review

The trial court's action was affirmed by the United States Court of Appeals for the Fourth Circuit after full briefing and oral argument on July 27, 1993. Rehearing by both the panel and the full court was denied on August 24, 1993.

5. Specific Misstatements of Fact

Several misstatements call for specific comment.

a. Discovery Delays Were Solely The Fault Of Petitioner

According to the Petition, it was "respondent who requested delay and postponement of discovery."[17] While it is true that Pitman sought and was granted 90 day extension of the November 8, 1990, discovery deadline, this neither accounts for nor excuses the two and one-half years of delay resulting from Petitioner's failure to prosecute her suit or to cooperate in discovery. In fact, the extension requested by Pitman was a direct consequence of Petitioner's recalcitrance. How could Pitman complete

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[16] ORDER OF DISMISSAL filed May 7, 1992, at 1 [Appendix D to the Petition at 12a]; ORDER filed June 30, 1992, at 10 [Appendix D to this Brief at App. 45].

[17] *See* PETITION at 4.

discovery if Petitioner failed to identify any expert witness or even specify the basis of her claim that the crane was defective?

b. Petitioner's Failure to Acknowledge The Obvious Connection Between North Carolina And The Accident Caused Significant Delay

Petitioner disingenuously attempts to shift the responsibility to Pitman for her failure to properly qualify as a personal representative of Decedent under North Carolina law.[18]

Other than the fact that Petitioner resided near New Orleans, the State of Louisiana has no connection with this case. In contrast, Decedent worked in North Carolina, he and his family resided there, the accident occurred near Charlotte, and all witnesses to the accident lived in North Carolina. Ignoring the obvious, Petitioner's counsel decided to bring suit in New Orleans and to obtain approval from a Louisiana court to act as the representative of Decedent's estate. Petitioner did not oppose Pitman's motion to transfer the case to North Carolina, apparently conceding that common sense dictated prosecuting the case in North Carolina.

The responsibility for obtaining court approval to bring suit obviously lies with Petitioner. Because the accident occurred in North Carolina and the decedent lived there, Janeau should have qualified under North Carolina law at the outset. Even overlooking this initial failure,

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[18] PETITION at 5.

there is no excuse for Petitioner to delay eight months in seeking proper qualification after being put on notice of the problem in April, 1991. A substantial waste of time and judicial resources could have been avoided had Janeau not chosen to contest this clear-cut issue.

c. Petitioner Violated The Court's October 25, 1991 Opinion And Order

The Fourth Circuit found that "[t]he district court specifically stated in its opinion and order that Janeau's failure to qualify within thirty days would result in the dismissal of her claims against Pitman.[19] Nevertheless, the Petition states that the trial court "subsequently rescinded its order of dismissal because the Order of October 25, 1991 neither required, nor suggested, that the court must receive special notification of Petitioner's timely compliance with North Carolina's qualification requirements.[20]

This dispute is easily resolved by examining the District Court's Opinion and Order of October 25, 1991, the December 4, 1991 Order of Dismissal, and the December 19, 1991 Order reinstating Janeau's claim – all of which were excluded from the Appendix to the Petition. The Opinion and Order expressly warns that "[o]nly plaintiff's proper representative and a supplemental pleading attesting to that fact can prevent the loss of this otherwise time-barred cause of action."[21] The District Court

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[19] Appendix B to the PETITION at 6a.

[20] Petition at 6.

[21] Appendix A to this Brief at App. 23.

afforded Petitioner thirty days within which to file a supplemental pleading establishing that Petitioner was properly qualified to pursue the claim under North Carolina law, and specified that failure *"shall* result in dismissal. . . . "[22]

The Opinion and Order left no ambiguity about the fact that Petitioner's non-compliance would result in dismissal.

d. Petitioner's Failure to Prosecute was Inexcusable

A fair reading of the Petition suggests that the action of the District Court was wholly unanticipated. This is absurd. Petitioner not only failed to advance the action, but she gave no indication that she had any plan of discovery that would enable her to make a *prima facie* case at some time in the future.

The fact that Petitioner's counsel participated in seven depositions beginning on May 6, 1992, does not excuse Petitioner's failure to prosecute her suit. Even with these depositions, Judge Voorhees characterized the case as "no closer to trial readiness now than it was on the day the initial complaint was filed."[23] If, as Petitioner now claims, existing deposition testimony was adequate to prove liability,[24] she ought to have apprised Judge

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[22] Appendix A to this Brief at App. 27.

[23] ORDER OF DISMISSAL filed May 7, 199?, at 1 [Appendix D to the PETITION at 12a]; ORDER filed June 30, 1992, at 10 [Appendix D to this Brief at App. 45].

[24] PETITION at 14-15.

Voorhees. Even assuming there is such testimony, it seems a bit much to argue that the trial court abused its discretion by ignoring information that was never brought to its attention. In fact, Petitioner has never presented anything that meets the standards imposed by North Carolina law.

REASONS WHY THE PETITION SHOULD BE DENIED

The Court of Appeals' action followed directly from such decisions as *Link v. Wabash R.R.*, 370 U.S. 626 (1962), and *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639 (1936). This case is extraordinary only in that it was twice dismissed by the trial court without opposition from Petitioner until after the Orders of Dismissal had been issued. The suggestion that the decision was so aberrant that review by this Court is required is simply wrong. Indeed, courts of appeals have approved the dismissal of cases as a sanction for failure to comply with court orders on two occasions since this case was decided. *Kuehl v. Federal Deposit Insurance Corp.*, No. 93-1419 (1st Cir. Nov. 17, 1993) [1993 U.S. App. LEXIS 29744]; *Proctor v. Millar Elevator Service Co.*, No. 93-7067 (D.C. Cir. Oct. 26, 1993) [1993 U.S. App. LEXIS 27696].

ARGUMENT

I. THIS COURT SHOULD NOT GRANT THE PETITION TO REVIEW THE FACTUAL FINDINGS OF THE DISTRICT COURT FOR ABUSE OF DISCRETION

This case involves no legitimate claim that the trial court misapplied the law. Instead, the sole question for review is whether Judge Voorhees abused his discretion in dismissing Petitioner's suit.[25] This fact-intensive determination is simply not worthy of review by the Supreme Court of the United States.

Although the panel unanimously held that dismissal was proper and no member of the Fourth Circuit concluded that rehearing was warranted, Petitioner asks this Court to examine the factual findings made by Judge Voorhees to determine whether the trial court's decision was "clearly unreasonable, arbitrary or fanciful."[26] Even the most cursory review of the Opinions and Orders below is sufficient to establish a record of delay and dilatory tactics upon which the Court could rationally have based its decision.

Petitioner apparently recognizes that this Court is unlikely to find the "special and important reasons" required by Rule 10.1 in a request to review factual findings. Consequently, Petitioner has attempted to create a legal issue. According to Petitioner, this Court must

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[25] *See National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 642 (1976).

[26] *E.g., Northrop Corp. v. McDonnell Douglas Corp.*, 751 F.2d 395, 399 (D.C. Cir. 1984).

decide whether she is *personally* responsible for the conduct which prompted the dismissal. This issue was resolved over thirty years ago in *Link v. Wabash R.R.*:

> There is certainly no merit to the contention that dismissal of petitioner's claim because of counsel's unexcused conduct imposes an unjust penalty on the client. Petitioner voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent. Any other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent and is considered to have "notice of all facts, notice of which can be chanced upon the attorney."

370 U.S. at 633-34.

It follows, then, that "a civil plaintiff may be deprived of his claim if he failed to see to it that his lawyer acted with dispatch in the prosecution of his lawsuit." 370 U.S. at 634. Petitioner has presented no reason why *Link* should be reconsidered. In fact, the decision is cited with approval in the Petition.[27]

While evidence of a litigant's personal responsibility is not a prerequisite for dismissal, Courts of Appeals uniformally consider a party's conduct in assessing the appropriate sanction. *E.g., Shupert v. Pringle Transit Co.*, No. 92-1926 (6th Cir. Mar. 30, 1993) [1993 WL 94312]; *Poulis v. State Farm Fire & Casualty Co.*, 747 F.2d 863, 868 (3rd Cir. 1984); *Dove v. CODESCO*, 569 F.2d 807, 811 (4th

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[27] PETITION at 9.

Cir. 1978). Petitioner all but concedes that the Fourth Circuit applies the same legal standard as the other Courts of Appeals when reviewing a dismissal under Rules 16(f), 37(b) and 41(b). What the Petition actually claims is that the lower court decision "reflects a vast departure from previous Fourth Circuit authorities."[28] In short, the "conflict" is the Fourth Circuit's alleged failure to properly apply the facts to its own legal standard, not a conflict among the Circuits.

II. THE APPLICATION OF FACTS TO WELL ESTABLISHED STANDARDS OF LAW WAS NOT SO ERRONEOUS AS TO CONSTITUTE ABUSE OF DISCRETION

Judging from the Petition, the trial court's decision is to be reviewed to determine whether the policy favoring the disposition of cases on the merits has been violated. This is disingenuous if not deceptive. *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639 (1976), leaves no doubt that abuse of discretion is the appropriate standard of review.

Abuse of discretion is particularly appropriate for what the Court has termed "issues involving what can broadly be labeled 'supervision of litigation'. . . . " *Pierce v. Underwood*, 487 U.S. 552, 558 n.1 (1988). The actions of the lower courts were unquestionably exercises in supervising litigation. Moreover, what a reviewing court might have done when presented with the same circumstances is irrelevant:

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[28] PETITION at 9.

> The question, of course, is not whether this Court, or whether the Court of Appeals, would as an original matter have dismissed the action; it is whether the District Court abused its discretion in so doing.

National Hockey League v. Metropolitan Hockey Club, 427 U.S. at 642 (1976).

If supported by the record, the sanction of dismissal ought not be set aside. Here, where the delay and failure to follow court orders continued even after the initial dismissal, the sanction imposed by Judge Voorhees was not only supportable, it was necessary. The conduct of Petitioner's counsel and the failure to comply with the Scheduling Order effectively precluded any lesser sanction. In short, dismissal under the authority of Rules 16(f), 37(b) and 41(b) was entirely proper.

A. The Court Correctly Held that Plaintiff's Repeated Acts of Willful Disobedience Warranted Severe Sanctions

Dismissal with prejudice is expressly contemplated as a sanction in just this kind of case by three separate provisions of the Federal Rules of Civil Procedure.

1. *Rule 41(b):*

Federal Rule of Civil Procedure 41(b) authorizes dismissal of a case "[f]or failure of the plaintiff *to prosecute or to comply with* these rules or *any order of court*. . . ." (emphasis added). A court may even dismiss *sua sponte* in the exercise of its inherent powers when necessary to

manage its own affairs. *Link v. Wabash R.R.*, 370 U.S. 626, 630-31 (1962). Dismissal because of counsel's misconduct does not impose an unjustified penalty on his client. 370 U.S. at 633-34.

In the Fourth Circuit, cases cannot be dismissed under Rule 41(b) without consideration of the individual circumstances:

> [d]istrict courts must take four factors into account in deciding whether Rule 41(b) dismissal is appropriate as a sanction:
>
> > (1) the degree of personal responsibility of the plaintiff, (2) the amount of prejudice caused the defendant, (3) the existence of a drawn out history of deliberately proceeding in a dilatory fashion, and (4) the existence of sanctions less drastic than dismissal.

Herbert v. Saffell, 877 F.2d 267, 270 (4th Cir. 1989); *see Davis v. Williams*, 588 F.2d 69, 70-71 (4th Cir. 1978); *McCargo v. Hedrick*, 545 F.2d 393, 396 (4th Cir. 1976); *Reizakis v. Loy*, 490 F.2d 1132, 1135 (4th Cir. 1974).

In *Herbert*, the Court of Appeals reversed a Rule 41(b) dismissal because it saw no evidence that (i) the delay was deliberate, (ii) counsel's conduct prolonged the litigation, or (iii) the trial court considered other, less drastic, sanctions. 877 F.2d at 270. That is hardly the case here. Specific findings by the trial court are unrebuttable evidence of deliberate delay prolonging the litigation. Moreover, this case has been twice dismissed. It is difficult to understand how the trial court could consider the efficacy of less drastic sanctions when dismissal itself was ineffective.

2. *Rule 37(b):*

Federal Rule of Civil Procedure 37(b)(2)(C) authorizes a district court to dismiss an action if a party fails to obey an order to permit or provide discovery. In *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639 (1976), the Court held that a district court did not abuse its discretion in dismissing an action because counsel for plaintiffs repeatedly failed to provide "crucial" information, disregarded specific dates, and failed to file timely motions even though warned that sanctions would be imposed under Rule 37. 427 U.S. at 640-41. The Court found that dismissal must be available as a sanction not only to punish those to exhibit "flagrant bad faith" and "flagrant disregard" of their responsibilities, but also to deter similar conduct by others. 427 U.S. at 643.

In *Roadway Express, Inc. v. Piper*, 447 U.S. 752 (1980), the Court re-emphasized that

> Rule 37 sanctions must be applied diligently both "to penalize those whose conduct may be deemed to warrant such a sanction, [and] to deter those who might be tempted to such conduct in the absence of such a deterrent."

447 U.S. at 763-64.

It seems clear that the dominant motivations, whether codified or not, for granting or affirming dismissal as a sanction under Rule 37(b) are (i) obvious bad faith or repeated disregard of court orders and (ii) the ineffectiveness of lesser sanctions. *See, e.g., National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639 (1976); *Marx v. Kelly, Hart & Hallman, P.C.*, 929 F.2d 8 (1st Cir. 1991); *Minotti v. Lensink*, 895 F.2d 100 (2d Cir.

1990); *Prince v. Poulos*, 876 F.2d 30 (5th Cir. 1989); *Wyle v. R. J. Industries, Inc.*, 709 F.2d 585 (9th Cir. 1983); *Wilson v. Volkswagen of America, Inc.*, 561 F.2d 494 (4th Cir. 1977); *Aerodyne Systems Engineering, Ltd. v. Heritage International Bank*, 115 F.R.D. 281 (D. Maryland 1987); *Snead v. Automation Industries, Inc.*, 102 F.R.D. 823 (D. Maryland 1984).

That test is certainly met here.

3. *Rule 16(f):*

Federal Rule of Civil Procedure 16(f) provides that "*[i]f a party or a party's attorney fails to obey a scheduling or pretrial order* . . . the judge, upon motion or the judge's own initiative, may make such orders with regard thereto as are just, and among others *any* of the orders provided in Rule 37(b)(2)(B), (C), (D)." (emphasis added). As discussed above, Rule 37(b)(2)(C) provides specific authorization for an order dismissing an action.

Rule 16 did not provide for sanctions prior to its amendment in 1983. The Notes of the Advisory Committee following the text of the Rule indicate that the orders of dismissal entered in such cases as *Link v. Wabash R.R.* would have been issued under Rule 16(f) rather than Rules 37(b) or 41(b) had they been decided after the 1983 amendments to Rule 16.

Those few cases construing Rule 16(f) indicate that failure to comply with a pretrial or scheduling order issued under Rule 16 will justify dismissal with prejudice if there is a clear record of unexplained delay and a finding that lesser sanctions would not suffice. *E.g., Ford v. Fogerty Van Lines, Inc.*, 780 F.2d 1582, 1583 (11th Cir.

1986); *cf. Geiserman v. MacDonald*, 893 F.2d 787, 792-93 (5th Cir. 1990) (enforcement of deadline set in Scheduling Order will not be disturbed unless party provides valid reason excusing compliance); *Bradley v. United States*, 866 F.2d 120, 124-25 (5th Cir. 1989) (failure to timely identify expert witnesses necessarily causes prejudice); *Carlson v. Grobman*, 133 F.R.D. 5, 8 (D. N.H. 1990) (Scheduling Order strictly enforced when extension or other relief not timely sought); *Gestetner Corp. v. Case Equipment Co.*, 108 F.R.D. 138, 141-42 (D. Me. 1985) (dates in Scheduling Order will not be set aside unless counsel can explain why he failed to object in a timely manner).

The record in this case contains little but delay. Petitioner has never even attempted to offer an explanation for her inaction. The case unquestionably meets the established criteria for dismissal.

B. Lesser Sanctions Would Have The Same Result

Any argument that lesser sanctions would cause counsel to mend his ways is rebutted by the fact that dismissal has already proven ineffective. Dismissal is particularly appropriate here because the result would be the same whatever sanction were imposed. Simply put, Petitioner cannot prove her claim with or without expert testimony.

- This is a diversity case, and thus what Petitioner must prove is governed by North Carolina law; whether she has adduced sufficient proof is a matter of federal law. *E.g., Owens v. Bourns, Inc.*, 766 F.2d 145, 149 (4th Cir.

1985); *Fitzgerald v. Manning*, 679 F.2d 341, 346 (4th Cir. 1982).

- Under North Carolina law, it is clear that neither negligence nor defective design can be presumed from the mere fact of an accident or injury. *E.g., Penland v. BIC Corp.*, 796 F. Supp. 877 (W.D.N.C. 1992); *Jolley v. General Motors Corp.*, 55 N.C. App. 383, 385-86, 285 S.E.2d 301, 303-04 (N.C. App. 1982).

- Rather, Plaintiff must produce specific evidence that a defect existed in the product when it left the manufacturer's hands. *E.g., Jolley v. General Motors Corp.*, 55 N.C. App. 383, 385-86, 285 S.E.2d 301, 303-04 (N.C. App. 1982).

- Moreover, Plaintiff must prove that this defect was the proximate cause of the accident in question. *E.g., Spivey v. White Motor Corp.*, 46 N.C. App. 313, 315, 264 S.E.2d 772, 774 (N.C. App. 1980).

- The showing that Plaintiff must make is clear from *McCollum v. Grove Manufacturing Co.*, 58 N.C. App. 283, 293 S.E.2d 632 (1982), a case also involving an accident with a heavy crane:

> [A] manufacturer is under a duty to those who use his product to exercise that degree of care in its design and manufacture that a reasonably prudent man would use in similar circumstances. The manufacturer of a machine which is dangerous because of the way in which it functions, and patently so, owes to those who use it a duty merely to make it free from latent defects and concealed dangers. In a case against such a

> manufacturer, the *plaintiff must prove the existence of a latent defect or of a danger not known to the plaintiff for other users.*
>
> . . . .
>
> Under our case law, a manufacturer has *no duty to equip his product with safety devices to protect against defects and dangers that are obvious.*

58 N.C. App. at 287-88, 293 S.E.2d at 635-36 (emphasis added); *see* North Carolina General Statutes § 99B-4.

- *McCollum* affirmed a directed verdict for the manufacturer because, among other things, (i) North Carolina has not adopted the doctrine of strict liability except for a few exceptional circumstances, (ii) a crane is not an inherently dangerous instrumentality, and (iii) a manufacturer has no duty to equip his products with safety devices to protect against obvious dangers. 58 N.C. App. at 289-91, 293 S.E.2d at 636-38.

- Although the Petition contends that Janeau can prove her case without an expert,[29] she has identified no witness, testimony, or other evidence that supports the conclusion that the crane was unreasonably dangerous. Without an appropriate record, no witness could demonstrate a connection between Pitman's supposed wrongdoing and Decedent's accident. Trial would be but a gesture given the absence of evidence indicating that the accident was in any way attributable to Pitman or its product.

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[29] PETITION at 14-15.

Petitioner argues that she should not be deprived of her day in court because her attorneys actively prosecuted a case in a foreign jurisdiction and postponed discovery with the agreement of counsel for Respondent.[30] This is factually incorrect and legally irrelevant. Since when does a party have the right to ignore court orders without punishment because the forum is distant or it believes delay is prudent? More to the point, what kind of a trial would Petitioner have if her case were remanded? Counsel has (i) apparently conceded it cannot use expert testimony,[31] (ii) failed to identify any defect in the two and one-half years the case was pending in the trial court,[32] and (iii) failed to identify *any* witnesses by the discovery deadline.[33]

Dismissal would penalize Appellant only if she has a case. But the record certainly doesn't indicate she has any chance on the merits. Consequently, dismissal will work no prejudice.

CONCLUSION

If the Court is going to decide how and under what circumstances courts may dismiss cases as a sanction, it should take a case clearly involving that issue. To take the

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[30] PETITION at 7.

[31] PETITION at 13-15.

[32] ORDER filed June 30, 1992 at 9 [Appendix D to this Brief at App. 45].

[33] ORDER filed March 3, 1992, at 1 [Appendix D to this Brief at App. 48].

case in order to affirm the decision of the Fourth Circuit would be pointless. To take the case in order to reverse it would require the Court to find that the Court of Appeals clearly abused its discretion by failing to find that the District Court obviously abused its discretion in dismissing a case that Petitioner had made almost no attempt to prepare for trial. Even assuming the Court were disposed to do so, reversal could serve no purpose. Even the lesser sanction of enforcing the Scheduling Order would result in dismissal, for Petitioner failed to list any witnesses, fact or expert, or identify any defect in Respondent's product.

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APPENDIX A

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

CIVIL NO. C-C-90-194-V

BRENDA JANEAU,
Plaintiff,
vs.
PITMAN MANUFACTURING COMPANY, INC., DUKE POWER COMPANY, and B & D CONTRACTORS OF SHELBY, INC.,
Defendants.

MEMORANDUM OF OPINION AND ORDER

(Filed Oct. 25, 1991)

THIS MATTER is before the Court on the following motions: Motion to Dismiss of Defendant Pitman Manufacturing Company ("Pitman"); Motions to Dismiss and for Summary Judgment of Defendant Duke Power Company ("Duke"); and Motions to Dismiss and for Summary Judgment of Defendant B & D Contractors of Shelby, Inc. ("B & D"). Because of the absence of complete diversity of citizenship between Plaintiff and Defendants Duke and B & D, the Court finds that it must dismiss this action as to those Defendants for lack of jurisdiction. Because of Plaintiff's failure to qualify properly as a personal representative of the Decedent under the laws of North Carolina, the Court finds dismissal is also warranted as to the claims against Pitman. However, for the reasons herein

enumerated, Pitman's motion to dismiss shall be held in abeyance for thirty (30) days, pending Plaintiff's satisfaction of the North Carolina statutory requirements for ancillary administrator or personal representative qualification.

I. INTRODUCTION

This case has it basis in a fatal accident which occurred in Charlotte, North Carolina, on December 5, 1988. John Ray Janeau ("Decedent"), was an employee of Southeastern Boring Contractors, Inc. ("Southeastern"). He was electrocuted while operating a truck-mounted Model HL-757 Pitman crane manufactured by Defendant Pitman, a Pennsylvania corporation with its principal place of business in Pennsylvania. The crane came into contact with an energized power line owned and maintained by Defendant Duke, a North Carolina corporation with its principal place of business in North Carolina. The accident occurred on a job site maintained and managed by Defendant B & D, a North Carolina corporation with its principal place of business in North Carolina. B & D had subcontracted with Southeastern for a portion of the work to be completed. Decedent was pronounced dead at Charlotte Memorial Hospital shortly after the accident.

On November 2, 1989, Plaintiff, the mother of the Decedent and a citizen of Louisiana, was appointed provisional administratrix of the "Succession of John Ray Janeau" by the 25th Judicial District Court for the Parish of Plaquemines, Louisiana. *See* Exhibit A of Plaintiff's Memorandum in Opposition to Motion for Summary

Judgment, filed June 13, 1991 (Pleading No. 34) ["Plaintiff's Opposing Memorandum"]. Plaintiff commenced this death by wrongful act suit against Pitman in the Civil District Court for the Parish of Orleans, State of Louisiana, on November 29, 1989. Neither Duke nor B & D were named as co-Defendants, despite the intimation of joint and several liability in the initial complaint.[1] Pitman filed its notice of removal on January 4, 1990, thereby removing this case to United States District Court for the Eastern District of Louisiana. On June 20, 1990, the case was transferred to the Western District of North Carolina, Charlotte Division, upon Pitman's motion. It was not until December 12, 1990, that Plaintiff moved to amend her complaint so as to name Duke and B & D, allegedly "liable to plaintiff jointly, severally, and *in solido* with each other and defendant, Pitman Manufacturing, Inc.," as co-Defendants in this matter. Plaintiff's First Supplemental and Amending Complaint, filed December 6, 1990 (Pleading No. 16) ["Amended Complaint"]. Leave was granted for the filing of the amended complaint, and the case was subsequently transferred to this Court when a potential conflict of interest arose in the Charlotte Division. *See* Order, filed December 12, 1990 (Pleading No.

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[1] According to the Complaint, the fatal accident occurred when the crane, of allegedly inadequate design and manufacture, "came into contact with or caused a load it was lifting to come into contact with electrical distribution or transmission lines rated 50kv that had not been de-energized and visibly grounded, and which did not have insulation barriers attached to them." Petition for Damages, filed November 29, 1989, from Record as transferred from United States District Court, Eastern District of Louisiana, filed June 25, 1990 (Pleading No. 1) ["Louisiana Record"].

19); Order, filed February 27, 1991 (Pleading No. 20). Duke and B & D were not served with a summons, giving notice of the pending action, until the latter part of March, 1991.

II. DISCUSSION

A. Diversity Jurisdiction

The only foundation for the Court's jurisdiction in this case is the diversity provision in 28 U.S.C. § 1332.[2] "The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $50,000, exclusive of interest and costs, and is between . . . citizens of different States. . . . " 28 U.S.C. § 1332(a)(1) (1988). This statute, providing district courts with diversity jurisdiction, requires each defendant's citizenship to differ from each plaintiff's citizenship. *See, e.g., Owen Equip. and Erection Co. v. Kroger*, 437 U.S. 365, 373 (1978); *American Fire & Cas. Co. v. Finn*, 341 U.S. 6, 17 (1951); *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267, 2 L.Ed. 435 (1806). The burden of proving diversity of citizenship is on the party invoking federal diversity jurisdiction.[3] *See, e.g., Hawes v. Club Ecuestre El*

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[2] No federal question jurisdiction under 28 U.S.C. § 1331 is implicated in a death by wrongful act claim, which is a matter of state law. *See, e.g., Nelson v. United States*, 541 F. Supp. 816, 817-18 (M.D.N.C. 1982).

[3] Pitman was the party responsible for this matter being removed to federal court and, in that regard, successfully established diversity of citizenship between it and Plaintiff. Petition for Removal, dated January 4, 1990, from Louisiana Record. *See Armstrong v. Goldblatt Tool Co.*, 609 F. Supp. 736, 737-38 (D. Kan.

Comandante, 598 F.2d 698, 702 (1st Cir. 1979); *Mas v. Perry*, 489 F.2d 1396, 1399 (5th Cir.), *cert. denied*, 419 U.S. 842 (1974).

Plaintiff alleges that the instant case pits a Louisiana plaintiff against three corporate defendants, one from Pennsylvania and two from North Carolina. The 1988 amendments to § 1332 suggest otherwise: "[T]he legal representative of the estate of a decedent shall be deemed to be a citizen only of the same State as the decedent. . . ." 28 U.S.C. § 1332(c)(2) (1988). This provision applies to "any civil action commenced in *or removed to* a United States district court on or after the 180th day after the date of enactment of this title," or May 18, 1989. Pub. L. 100-702, § 202(b) (emphasis added). *See also* 1 *Moore's Federal Practice* para. 0.74[6.-8], at 800.19-800.20 (2d ed. & Supp. 1991); D. Siegel, "Commentary on 1988 Revisions to 28 U.S.C. § 1332," at 5, 28 U.S.C.A. § 1332 (Supp. 1991). This case was removed from the Civil District Court for the Parish of Orleans, State of Louisiana, to the United States District Court for the Eastern District of Louisiana on January 4, 1990. Therefore, the 1988 amendments to 28 U.S.C. § 1332 are controlling. *See Sayers v. Sears, Roebuck &*

1985); *Electronic Data Systems Corp. v. Kinder*, 360 F. Supp. 1044, 1047 (N.D. Tex.), *aff'd*, 497 F.2d 222 (5th Cir. 1974). However, when Plaintiff attempted to bring in two new defendants who contest diversity jurisdiction, the burden of proving diversity shifted to the Plaintiff as the party invoking the Court's jurisdiction over these new parties. *See, e.g., Lang v. Windsor Mt. Joy Mut. Ins. Co.*, 487 F. Supp. 1303, 1305 (E.D. Pa.), *aff'd*, 636 F.2d 1209 (3d Cir. 1980); *National Spinning Co. v. Washington*, 312 F. Supp. 958, 961 (E.D.N.C. 1970).

Co., 732 F. Supp. 654, 655 (W.D. Va. 1990). Because Plaintiff is proceeding "in her representative capacity as Administratrix," her citizenship for purposes of diversity jurisdiction will be deemed to be that of the Decedent. Plaintiff's Opposing Memorandum, at 1.

According to the record, the Decedent in the instant case was a citizen[4] of North Carolina at the time of his death. Plaintiff, a deemed North Carolina citizen under § 1332(c)(2), cannot bring suit against Duke and B & D, both North Carolina corporations, in diversity. This action must therefore be dismissed as to Duke and B & D under Fed. R. Civ. P. 12(b)(1).

Decedent was a citizen of Louisiana until his discharge from military service in 1984. He was born, raised, and educated in Louisiana, and his parents remained in Louisiana. *See* Affidavit of Brenda Janeau, dated June 6, 1991, and attached as Exhibit C to Plaintiff's Opposing Memorandum ["Brenda Janeau Affidavit"]; Plaintiff's Answers to Interrogatories, dated February 22, 1990, and attached as Exhibit B to Memorandum in Support of

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[4] For purposes of 28 U.S.C. § 1332, citizenship and domicile are synonymous. *See, e.g., Sadat v. Mertes*, 615 F.2d 1176, 1180 (7th Cir. 1980); *Guerrero v. Katzen*, 571 F. Supp. 714, 722 (D.C. 1983); *Webb v. Nolan*, 361 F. Supp. 418, 421 (M.D.N.C. 1972), *aff'd*, 484 F.2d 1049 (4th Cir. 1973), *app. dism.*, 415 U.S. 903 (1974); *Griffin v. Matthews*, 310 F. Supp. 341, 342 (M.D.N.C. 1969), *aff'd*, 423 F.2d 272 (4th Cir. 1970); 1 *Moore's Federal Practice* para. 0.74[3], at 779. However, residence is not the same as domicile or citizenship. *See, e.g., Jagiella v. Jagiella*, 647 F.2d 561, 563 (5th Cir. 1981); *Banks v. St. Mary's Hosp. & Medical Center*, 558 F. Supp. 1334, 1335 (D. Colo. 1983); *Sasso v. Koehler*, 445 F. Supp. 762, 764 (D. Md. 1978); 1 *Moore's Federal Practice* para. 0.74[3.-2], at 782.

Defendant Pitman Manufacturing Company's Motion to Compel Discovery from Plaintiff, from Louisiana Record (Decedent "received an honorable discharge [from military service] in 1984"). In 1984, Decedent moved to North Carolina. *See* Brenda Janeau Affidavit ("following his discharge from military service, John Janeau traveled to the State of North Carolina, where he was employed temporarily and sporadically by South Eastern Boring Contractors [sic]").

Although often considered prima facie evidence of domicile, a mere change in residence by itself is insufficient to alter one's domicile or citizenship. *See, e.g., Krasnov v. Dinan*, 465 F.2d 1298, 1300 (3d Cir. 1972); *Korn v. Korn*, 398 F.2d 689, 691 n.4 (3d Cir. 1968); *Hakkila v. Consolidated Edison Co.*, 745 F. Supp. 988, 990 (S.D.N.Y. 1990); *Ratner v. Lucisano Bros.*, 505 F. Supp. 124, 126 (E.D. Pa. 1981); *Webb*, 361 F. Supp. at 420-21; *Seaboard Finance Co. v. Davis*, 276 F. Supp. 507, 509 (N.D. Ill. 1967). In order to effect a change in domicile or citizenship, one must take up residence in a different domicile with the intent to remain there. *See, e.g., Sadat*, 615 F.2d at 1180; *Mas*, 489 F.2d at 1399; *Krasnov*, 465 F.2d at 1300; *Korn*, 398 F.2d at 691 n.4; *Abbott v. United Venture Capital, Inc.*, 718 F. Supp. 823, 826 (D. Nev. 1988); *Ferrara v. Ibach*, 285 F. Supp. 1017, 1018-19 (D.S.C. 1968); 1 *Moore's Federal Practice* para. 0.74[3.-1], at 780. In determining a person's citizenship, the Court may consider such factors as the person's declarations, place of business, payment of taxes, house of residence, driver's license and automobile registration and title, ownership of real and personal property, telephone number and listing, payment for utilities, banking,

receipt of mail, and exercise of political rights or satisfaction of the domicile's requirements to register and vote. *See, e.g., Krasnov,* 465 F.2d at 1301; *Simmons v. Skyway of Ocala,* 592 F. Supp. 356, 359 (S.D. Ga. 1984); *Knapp v. State Farm Ins.,* 584 F. Supp. 905, 907 (E.D. La. 1984); *Miller Dress Factory, Inc. v. Douglas,* 385 F. Supp. 874, 877 (D.P.R. 1974); *Webb,* 361 F. Supp. at 421-22; *Griffin,* 310 F. Supp. at 343; 1 *Moore's Federal Practice* para. 0.74[3.-3], at 787-89.

An evaluation of the objective facts in this case points to Decedent's intentional change of domicile from Louisiana to North Carolina. From 1984 to the date of the accident, Decedent lived in Rutherford County, North Carolina, and was employed, at least periodically, by Southeastern, a North Carolina corporation located in Forest City, North Carolina. *See, e.g.,* Defendant Pitman's Memorandum in Support of Motion to Transfer Pursuant to 28 U.S.C. § 1404(a), at 3, filed May 21, 1990, from Louisiana Record; Exhibit A of Defendant Duke Power's Motion to Dismiss and for Summary Judgment, filed April 18, 1991 (Pleading No. 23) (Death Certificate of John Janeau); Memorandum in Support of Defendant B & D's Motion for Summary Judgment, at 1, filed May 20, 1991 (Pleading No. 27); Brenda Janeau Affidavit. There is no evidence that Decedent lived or worked anywhere other than North Carolina during this time. *See* Brenda Janeau Affidavit. In 1988, Decedent started his own family in North Carolina by marrying Geraldine Harris Janeau, a native of Rutherford County, North Carolina, and fathering Patricia Lynn Janeau, who was born in Rutherfordton, North Carolina. *See* Exhibit 5 of Defendant Duke's Request for Judicial Notice, filed June 19, 1991 (Pleading No. 36) ["Judicial Notice Request"] (Rutherford County

Board of Elections Certification of Voter Registration for Geraldine Harris Janeau, listing her place of birth as Rutherford County); Exhibit 6 of Judicial Notice Request (Birth Certificate of Patricia Lynn Janeau). Decedent's wife and child have remained in Rutherford County to this date. *See* Exhibit 4 of Judicial Notice Request (1990 Rutherford County Property Tax Listing Form for Geraldine Janeau); Exhibit 5 of Judicial Notice Request.

At the time of the accident, Decedent's automobile was registered with the North Carolina Department of Motor Vehicles, displayed a 1987 North Carolina license tag, and was listed with the Rutherford County Tax Office for purposes of property tax payments in North Carolina. *See* Exhibit 3 of Judicial Notice Request (Rutherford County Tax Office Listing for John Ray Janeau). Decedent had a North Carolina driver's license since at least October, 1986, and an extensive history of traffic violations, all of which occurred in North Carolina. *See* Exhibit 1 of Judicial Notice Request (North Carolina Department of Motor Vehicles Driver's License Check for John Ray Janeau). Decedent incurred various expenses in the State of North Carolina, including taxes. *See, e.g.,* Exhibit 2 of Judicial Notice Request (1988 Rutherford County Tax Collector Statement of Taxes Due for John Ray Janeau). Decedent had obtained both a North Carolina telephone number and a North Carolina telephone directory listing. *See* BellSouth Advertising & Publishing Corporation, *Southern Bell Telephone Directory for Rutherford County, August 1988-1989,* at 33 (1988). Decedent maintained a North Carolina mailing address. *See* Exhibits 1, 2, and 3 of Judicial Notice Request. Although no evidence has been

presented that he was registered to vote in North Carolina, Decedent satisfied the North Carolina requirements to register and vote in Rutherford County, "the residence . . . in which his habitation was fixed, and to which, whenever he [was] absent, he [had] the intention of returning." N.C. Gen. Stat. § 163-57(1) (1987). *See Webb*, 361 F. Supp. at 422. Decedent's wife has since registered to vote in Rutherford County, North Carolina. *See* Exhibit 5 of Judicial Notice Request. Subsequent to the accident, a worker's compensation proceeding based on Decedent's accident was instituted in North Carolina, under the laws of North Carolina, and death benefits were paid thereunder. *See* Notice of Deposition of Brenda Janeau, at 2, filed August 17, 1990 (Pleading No. 4); Notice of Deposition of Brenda Janeau, at 2, filed September 4, 1990 (Pleading No. 5); Answer of Defendant B & D, at 6, filed April 11, 1991 (Pleading No. 22).

In rebuttal, Plaintiff presents two untimely-filed affidavits which purport to demonstrate Decedent's stated intention either to maintain Louisiana as his permanent domicile or to move back to Louisiana permanently. The first affidavit, filed by one Vernon Bird, stated that the Decedent had accepted employment with Bird in Louisiana prior to his accident. Affidavit of Vernon Bird, dated June 6, 1991, and attached as Exhibit B to Plaintiff's Opposing Memorandum ["Bird Affidavit"]. Shortly before his accident, Decedent purportedly stated his intention to Bird to "begin his employment as soon as he made housing arrangements for his family in Louisiana." *Id.* The second affidavit, filed by the Plaintiff in this action, described Decedent's childhood in Louisiana, his military service in the Philippines, and his subsequent

employment and residence in North Carolina. Brenda Janeau Affidavit. Plaintiff's affidavit then sets forth an apparent inconsistency as to Decedent's domicile. Plaintiff first makes the conclusory, unsupported statement that Decedent "maintained his permanent residence and domicile in the State of Louisiana." *Id.* at 1. This assertion is then undercut by a series of statement suggesting that Decedent intended to permanently change his domicile *back* to Louisiana: "John Janeau expressed *his intention to return to Louisiana*"; "John Janeau expressed *his intention to return permanently to Louisiana* in order to work for Mr. Bird as soon as living accommodations could be arranged in Louisiana for John Janeau and his family"; and "*before returning to Louisiana to make permanent living arrangements* for himself and his family, John Janeau died in North Carolina." *Id.* at 2 (emphasis added).

There are numerous factors weighing against the persuasiveness of these statements. First, the question of domicile is to be evaluated in terms of objective facts; statements of intent, particularly when presented second-hand as in the instant case, are entitled to little weight when in conflict with such facts. *See, e.g., Freeman v. Northwest Acceptance Corp.*, 754 F.2d 553, 556 (5th Cir. 1985); *Hendry v. Masonite Corp.*, 455 F.2d 955, 956 (5th Cir.), *cert. denied*, 409 U.S. 1023 (1972); *Korn*, 398 F.2d at 691; *Garner v. Pearson*, 374 F. Supp. 580, 589 (M.D. Fla. 1973); *Webb*, 361 F. Supp. at 421; *Tanzymore v. Bethlehem Steel Corp.*, 325 F. Supp. 891, 894 (E.D. Pa. 1971), *aff'd*, 457 F.2d 1320 (3d Cir. 1972); *Griffin*, 310 F. Supp. at 343; 1 *Moore's Federal Practice* para. 0.74[3.-3], at 789. The evidence outlined above demonstrates that, prior to his demise, Decedent had effectuated a change in domicile

from Louisiana to North Carolina, in that he had changed his residence to, was physically present in, and intended to remain in North Carolina indefinitely. *See, e.g., Sadat,* 615 F.2d at 1180; *Mas,* 489 F.2d at 1399; *Ferrara,* 285 F. Supp. at 1018-19. "As soon as the requisite intention is coupled with physical presence, a new domicile is created; there is no required minimum period of presence." 1 *Moore's Federal Practice* para. 0.74[3.-3], at 784-85 (footnote omitted). *See also Hawes,* 598 F.2d at 701; *Bair v. Peck,* 738 F. Supp. 1354, 1355 (D. Kan. 1990).

Second, Decedent's thoughts of moving back to Louisiana are insufficient to alter his North Carolina domicile without his physical and intentional return to Louisiana. *See, e.g., Lew v. Moss,* 797 F.2d 747, 750 (9th Cir. 1986); *Hakkila,* 745 F. Supp. at 990; *Carter v. McConnell,* 576 F. Supp. 556, 558 (D. Nev. 1983); *Reynolds v. Ranta,* 362 F. Supp. 333, 334 (W.D. Pa. 1973); 1 *Moore's Federal Practice* para. 0.74[3.-3], at 787 ("[A] general or floating intention to return to an old domicile or go elsewhere at some indefinite time in the future does not prevent the establishment [sic] of a domicile in one's present state of residence."). The proffered affidavits concede that Decedent had yet to physically relocate in Louisiana. *See* Bird Affidavit; Brenda Janeau Affidavit. Absent an affirmative change of citizenship back to Louisiana, Decedent's North Carolina citizenship is presumed to remain intact. *See, e.g., Lew,* 797 F.2d at 751; *Scoggins v. Pollock,* 727 F.2d 1025, 1026-27 (11th Cir. 1984).

Finally, Plaintiff's proffered affidavits were served and filed on June 12 and 13, 1991, respectively, two to three days *after* the June 10 hearing on the pending motions in this matter and in direct violation of the

language of Fed. R. Civ. P. 6(d): "opposing affidavits may be served not later than 1 day before the hearing." The untimeliness of Plaintiff's proffered affidavits renders them null.

Plaintiff argues that, because the "Succession of John Janeau" is a separate legal entity created and existing under the laws of Louisiana, and because this case should be controlled by Louisiana law,[5] the "Succession" should be deemed to have Louisiana citizenship in its own right. *See* Plaintiff's Opposing Memorandum. The determination of a litigant's citizenship for purposes of diversity jurisdiction is controlled by federal common law, not by the law of any state. *See, e.g., Rodriguez-Diaz v. Sierra-Martinez*, 853 F.2d 1027, 1030 (1st Cir. 1988); *Mas*, 489 F.2d at 1399; *Ziady v. Curley*, 396 F.2d 873, 874 (4th Cir. 1968); *Smith v. Cessna Aircraft Co.*, 571 F. Supp. 433, 437 (M.D.N.C. 1983); 1 *Moore's Federal Practice* para. 0.74[3.-1], at 781. Furthermore, the Succession has not been named as a party to this action, rendering its citizenship

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[5] Plaintiff, focusing on a perceived conflict between the laws of North Carolina and Louisiana, seeks application of Louisiana law pursuant to the Supreme Court decisions in *Van Dusen v. Barrack*, 376 U.S. 612 (1964), and *Ferens v. John Deere Company*, 494 U.S. 516, 110 S. Ct. 1274 (1990). *See, e.g.*, Plaintiff's Opposing Memorandum, at 3-7. The basic premise in the *Van Dusen* line of cases is that "[a] transfer under [28 U.S.C.] § 1404(a) . . . does not change the law applicable *to a diversity case.*" *Ferens*, 494 U.S. at ___, 110 S. Ct. at 1280 (emphasis added). In other words, the prerequisite for the application of *Van Dusen*, which Plaintiff presupposes in the instant case (*see, e.g.*, Plaintiff's Opposing Memorandum, at 3), is complete diversity of citizenship. As demonstrated herein, a finding of complete diversity is unwarranted in the instant case.

irrelevant for diversity purposes. Because Plaintiff is proceeding as the Decedent's legal representative, 28 U.S.C. § 1332(c)(2) requires that she be considered, for purposes of diversity jurisdiction, a citizen of North Carolina.

B. Duke and B & D's Motions to Dismiss

The postremoval addition of Duke and B & D as Defendants, and the concomitant loss of complete diversity, divests this Court of diversity jurisdiction. However, the misjoinder of such nondiverse parties cannot be the sole basis for the dismissal of an action. Fed. R. Civ. P. 21. "Under Rule 21, a court may preserve diversity jurisdiction by dismissing nondiverse parties, as long as the parties are not indispensable under Rule 19." 1 *Moore's Federal Practice* para. 0.74[1], at 768 (footnotes omitted). The presence of Duke and B & D as parties in this action would be desirable, in that their participation would facilitate the full resolution of all parties' claims pertaining to Decedent's fatal accident.[6] However, these two

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[6] The facts as alleged in this case demonstrate a tripartite concurrence of negligence in machine design (by Pitman), failure to insulate and properly erect power lines (by Duke), and failure to insure and maintain a safe and proper work site (by B & D). *See* Amended Complaint. These allegations of the joint and several liability run throughout the course of Plaintiff's pleadings in this matter. *See, e.g.*, Plaintiff's Opposing Memorandum; Plaintiff's Memorandum in Support of Motion for Leave to File First Supplemental and Amending Complaint, filed December 11, 1990 (Pleading No. 18); Defendant Pitman's Motion to Transfer Pursuant to 28 U.S.C. § 1404(a), dated May 21, 1990, at 11-12, from Louisiana Record; Plaintiff's Petition for damages, dated November 29, 1989, from Louisiana Record.

nondiverse Defendants are not "indispensable" within the meaning of Rule 19. "[Rule 19] is not at variance with the settled authorities holding that a tortfeasor with the usual 'joint-and-several' liability is merely a permissive party to an action against another with like liability. Joinder of these tortfeasors continues to be regulated by Rule 20. . . . " Notes of Advisory Committee on Rule 19, 1966 Amendment General Considerations (citations omitted).

The permissive joinder provision in Rule 20 is unavailable in the instant case, since the joinder of Duke and B & D would deprive this Court of diversity jurisdiction. However, this case can readily and equitably proceed without Duke and B & D. The absence of these nondiverse Defendants is of little consequence to the Plaintiff because the theory of joint and several liability, upon which Plaintiff proposes to proceed in this action, allows her to recover the entire amount of damages, if any, from any one of the joint tortfeasors. *See, e.g., Stuckey v. Northern Propane Gas Co.*, 874 F.2d 1563, 1572 n.11 (11th Cir. 1989); *United States v. Monsanto Co.*, 858 F.2d 160, 171-72 (4th Cir. 1988), *cert. denied*, 490 U.S. 1106 (1989); *Diggs v. Hood*, 772 F.2d 190, 193 (5th Cir. 1985); *Transgo, Inc. v. Ajac Transmission Parts Corp.*, 768 F.2d 1001, 1023 (9th Cir. 1985), *cert. denied*, 474 U.S. 1059 (1986); *In re Uranium Antitrust Litigation*, 617 F.2d 1248, 1257 (7th Cir. 1980). Neither would Defendant Pitman be prejudiced by the absence of Duke and B & D, for Pitman may avail itself of the third party practice provisions of Rule 14[7] or

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[7] *See, e.g., Karcher v. May*, 484 U.S. 72, 77 (1987); *Stewart v. American Int'l Oil & Gas Co.*, 845 F.2d 196, 199 (9th Cir. 1988);

a subsequent contribution action.[8] The proper remedy in this case is to drop Defendants Duke and B & D as misjoined parties under Rule 21. *See, e.g., Miller v. Leavenworth-Jefferson Elec. Coop., Inc.*, 653 F.2d 1378, 1382 (10th Cir. 1981); *Zepik v. Tidewater Midwest, Inc.*, 719 F. Supp. 751, 755 (N.D. Ind. 1989); *South Carolina Elec. & Gas Co. v. Ranger Constr. Co.*, 539 F. Supp. 578, 580 (D.S.C. 1982). Defendants Duke and B & D are hereby dismissed for lack of diversity jurisdiction. Fed. R. Civ. P. 12(b)(1). As a result of this dismissal, Duke and B & D's motions for summary judgment are denied as moot.

C. Pitman's Motion to Dismiss

In resolving Pitman's motion to dismiss, the Court must decide whether North Carolina or Louisiana law controls Plaintiff's death by wrongful act claim. Because Decedent was a domiciliary of North Carolina at the time

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Watergate Landmark Condominium Unit Owners' Ass'n v. Wiss, Janey, Elstner Assocs., Inc., 117 F.R.D. 576, 577 (E.D. Va. 1987); *Hanhauser v. United States*, 85 F.R.D. 89, 90-91 (M.D. Pa. 1979). So structured, the absence of complete diversity between Plaintiff and Third Party Defendants Duke and B & D would not divest this Court of diversity jurisdiction. *See, e.g., Fawvor v. Texaco, Inc.*, 546 F.2d 636, 638 (5th Cir. 1977); *Lamar Haddox Contractor, Inc. v. Potashnick*, 552 F. Supp. 11, 13 (M.D. La. 1982). The structural realignment of parties pursuant to Rule 14 would not then permit Plaintiff to re-amend her complaint to name Duke and B & D as additional defendants. *See Owen Equip. & Erection Co.*, 437 U.S. at 373-77.

[8] *See, e.g., Diggs*, 772 F.2d at 193; *Ducre v. Executive Officers of Halter Marine, Inc.*, 752 F.2d 976, 984 (5th Cir. 1985); *Premier Corp. v. Economic Research Analysts, Inc.*, 578 F.2d 551, 554 (4th Cir. 1978); N.C. Gen. Stat. §§ 1B-1 et seq. (1983).

of his death, the Court finds that North Carolina has exclusive jurisdiction over the disposition of the Decedent's estate.

> The domiciliary, or original, administration of the estates of all decedents domiciled in North Carolina at the time of death shall be under the jurisdiction of this State and of a proper clerk of superior court in this State, and the original probate of all wills of such persons shall be in this State. Any administration of the estate and any probate of a will of such decedents outside North Carolina shall be ancillary only.

N.C. Gen. Stat. § 28A-26-1 (1984). *See also* N.C. Gen. Stat. § 28A-2-1 (jurisdiction for the administration, settlement, and distribution of decedent's estate rests with the clerk of superior court of each county in North Carolina). "The venue for the probate of a will and for all proceedings relating to the administration of the estate of a decedent shall be: (1) In the county in this State where the decedent has his domicile at the time of his death. . . . " N.C. Gen. Stat. § 28A-3-1 (Supp. 1990). As established *supra*, Decedent was a domiciliary of Rutherford County, North Carolina at the time of his demise. The jurisdiction of the clerk of superior court for Rutherford County over the administration, settlement, and distribution of Decedent's estate, including the proper appointment of a personal administrator, is statutory, original, and exclusive. *See, e.g., In re Estate of Davis*, 277 N.C. 134, 143-44, 176 S.E.2d 825, 830-31 (1970); *In re Estate of Lowther*, 271 N.C. 345, 353-54, 156 S.E.2d 693, 700 (1967); *Morris v. Morris*, 245 N.C. 30, 32, 95 S.E.2d 110, 112 (1956); *Brissie v. Craig*, 232 N.C. 701, 704, 62 S.E.2d 330, 332 (1950); *Central Bank & Trust Co. v. Board of Comm'rs*, 195 N.C. 678, 680-81, 143

S.E. 252, 253-54 (1928); *Brace v. Strother*, 90 N.C. App. 357, 362, 368 S.E.2d 447, 450, *review denied*, 323 N.C. 171, 373 S.E.2d 104 (1988); *In re Estate of Longest*, 74 N.C. App. 386, 390, 328 S.E.2d 804, 807, *cert. denied and app. dism.*, 314 N.C. 330, 333 S.E.2d 488 (1985); *In re Estate of Snipes*, 45 N.C. App. 79, 81, 262 S.E.2d 292, 294 (1980).

Under the North Carolina statutes, there are numerous problems with Plaintiff's appointment as administratrix in the State of Louisiana. First, absent issuance of letters testamentary designating Decedent's mother as executor, North Carolina's statutory hierarchy for the granting of letters of administration would favor Decedent's surviving spouse as personal representative over Decedent's mother. N.C. Gen. Stat. § 28A-4-1(b)(1) (Supp. 1990).[9] There is no indication on the record that the letter testamentary issued to Plaintiff in Louisiana satisfies the North Carolina statutory requirements. Second, "[n]o person is qualified to serve as a personal representative who . . . [i]s a nonresident of this State who has not appointed a resident agent to accept service of process in all actions or proceedings with respect to the estate, and caused such appointment to be filed with the court. . . . " N.C. Gen. Stat. § 28A-4-2 (1984). There is no indication on the record that Plaintiff has complied with this requirement. Third, Plaintiff has failed to demonstrate her satisfaction of the other statutory prerequisites

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[9] Such appointment of Decedent's spouse as personal representative would have been particularly prudent in the instant case, in light of the fact that Decedent's spouse remains a domiciliary of Rutherford County. *See* Exhibits 4, 5, and 6 of Judicial Notice Request.

for the valid appointment of a personal representative. *See, e.g.*, N.C. Gen. Stat. §§ 28A-6-1 (requiring sworn affidavits for the issuance of letters of administration or letters testamentary); 28A-7-1 (oath required before issuance of letters); 28A-8-1 (bond required before issuance of letters for nonresident executor who has failed to appoint a resident agent to accept service of process). Finally, even if Decedent was a nonresident of North Carolina at the time of his death, Plaintiff has failed to comply with the domiciliary and ancillary administration requirements governing the collection of Decedent's North Carolina-based assets, which include the statutory right to a death by wrongful act cause of action predicated upon allegedly tortious conduct in North Carolina. N.C. Gen. Stat. § 28A-26-1 et seq. *See also In re Scarborough*, 261 N.C. 565, 568, 135 S.E.2d 529, 531 (1964); *Fann v. North Carolina R.R.*, 155 N.C. 136, 140, 71 S.E. 81, 82 (1911); N.C. Gen. Stat. §§ 28A-3-1, 28A-18-1 et seq. (1984 & Supp. 1990). As a foreign administrator, Plaintiff must qualify locally before she has the capacity to bring a death by wrongful act action in this State. *Burcl v. North Carolina Baptist Hosp., Inc.*, 306 N.C. 214, 217-18, 293 S.E.2d 85, 87-88 (1982).

Because the right to a death by wrongful act action is exclusively statutory, it must be asserted in strict conformity therewith. *See, e.g., Burcl*, 306 N.C. at 217, 293 S.E.2d at 87; *Webb v. Eggleston*, 228 N.C. 574, 576, 46 S.E.2d 700, 702 (1948); *Monfils v. Hazlewood*, 218 N.C. 215, 216, 10 S.E.2d 673 (1940), *cert. denied*, 312 U.S. 684 (1941); *Bowling v. Combs*, 60 N.C. App. 234, 236-37, 298 S.E.2d 754, 756, *petition denied*, 307 N.C. 696, 301 S.E.2d 389 (1983). Under N.C. Gen. Stat. § 28A-18-1(a), only the duly-appointed

personal representative of the Decedent can maintain an action for damages for Decedent's death by wrongful act. *See, e.g., Miller v. Perry*, 307 F. Supp. 633, 634 (E.D.N.C. 1969), *rev'd on other grounds*, 456 F.2d 63 (4th Cir. 1972); *Burcl*, 306 N.C. at 217, 293 S.E.2d at 87; *Journigan v. Little River Ice Co.*, 233 N.C. 180, 182-83, 63 S.E.2d 183, 185 (1951); *Hanes v. Southern Pub. Util. Co.*, 191 N.C. 13, 18, 131 S.E. 402, 404 (1926); *Merchants Distrib. Inc. v. Hutchinson*, 16 N.C. App. 655, 659, 193 S.E.2d 436, 439 (1972). A personal representative can sue only in his official, and not in his private or individual, capacity. *See, e.g., McCoy v. Atlantic Coast Line R.R.*, 229 N.C. 57, 59, 47 S.E.2d 532, 534 (1948); *Hall v. Southern R.R.*, 146 N.C. 345, 59 S.E. 879 (1907); N.C. Gen. Stat. §§ 28A-18-1 to 18-3 (1984 & Supp. 1990).

Because Plaintiff is an unqualified personal representative under North Carolina law, she has no legal capacity to initiate a death by wrongful act claim in a representative capacity. *See, e.g., Graves v. Welborn*, 260 N.C. 688, 690-91, 133 S.E.2d 761, 762 (1963); *Monfils*, 218 N.C. at 216, 10 S.E.2d at 673-74; *Johnson v. Wachovia Bank & Trust Co.*, 22 N.C. App. 8, 10, 205 S.E.2d 353, 355 (1974); *Reid v. Smith*, 5 N.C. App. 646, 169 S.E.2d 14 (1969). Furthermore, Plaintiff may not maintain a death by wrongful act action in her individual capacity as a parent of the Decedent. *See, e.g., Killian v. Southern R.R.*, 128 N.C. 261, 38 S.E. 873 (1901); *Scarlett v. Norwood*, 115 N.C. 284, 20 S.E. 459 (1894); *Boulton v. Onslow County Bd. of Educ.*, 58 N.C. App. 807, 295 S.E.2d 246 (1982). Hence, absent representative or individual capacity to sue, Plaintiff is without standing to institute this action against Pitman, and this claim

must be dismissed pursuant to Fed. R. Civ. P. 12(b)(1) and (6).

Even if this death by wrongful act claim is controlled by Louisiana law, the Court finds that Plaintiff's failure to strictly adhere to the dictates of the Louisiana Code would warrant a dismissal of this action. Both Louisiana and North Carolina recognize two elements of damages implicit in a death by wrongful act action: the first, considered to be an asset of the estate, encompasses Decedent's pain and suffering and the ensuing hospital and medical expenses attributable to the wrongful injury; the second contemplates the loss suffered by Decedent's family and inures to the benefit of the Decedent's next of kin. *See, e.g., Collins v. Zachary Hardwood Lumber Co.*, 207 So. 2d 796 (La. Ct. App. 1968); *Stetson v. Easterling*, 274 N.C. 152, 161 S.E.2d 531 (1968); La. Civ. Code Ann. art. 2315 et seq. (West 1990); N.C. Gen. Stat. § 28A-18-1 et seq. (1984). However, Louisiana splits these two elements of damages into separate causes of action (wrongful death and survival), while North Carolina consolidates them into a single measure of recoverable damages in a death by wrongful act action. *Compare* La. Civ. Code Ann. arts. 2315.1, 2315.2 *with Kendrick v. Cain*, 272 N.C. 719, 159 S.E.2d 33 (1967); N.C. Gen. Stat. § 28A-18-2(b). Louisiana creates a statutory hierarchy of persons authorized to assert the wrongful death and survival causes of action. *See* La. Civ. Code Ann. arts. 2315.1, 2315.2.

Under the Louisiana Code, both the survival and the wrongful death actions may be asserted by "(1) The surviving spouse and child or children of the deceased, or either the spouse or the child or children; (2) The surviving father and mother of the deceased, or either of them *if*

he left no spouse or child surviving. . . . " La. Civ. Code Ann. arts. 2315.1, 2315.2 (emphasis added). Only the survival action "may be urged by the decedent's succession representative *in the absence of* any class of beneficiary set out in the preceding Paragraph [i.e. absent a surviving spouse, child, or parent]." La. Civ. Code Ann. art. 2315.1.B (emphasis added). "It is clear . . . that, if a spouse or child survives the decedent, surviving parents have no right to recover damages. . . . " *DeVerges v. Bourg*, 314 So. 2d 558, 560 (La. Ct. App. 1975). In other words, even if this action were brought under the Louisiana survival and wrongful death statutes, neither Plaintiff nor the Succession of John Janeau could properly assert the claims presented in the instant case because of the survival of Decedent's spouse and daughter. *See, e.g., Ascani v. Hughes*, 470 So. 2d 207 (La. Ct. App.), *cert. denied*, 472 So. 2d 919, *cert. denied and app. dism.*, 474 U.S. 1001 (1985); *LaBorde v. Eagle Trucking Co.*, 409 So. 2d 1266 (La. Ct. App.), *cert. denied*, 413 So. 2d 506 (1982); *DeVerges*, 314 So. 2d at 560.

D. Stay of Dismissal

Although Pitman's motion to dismiss is well taken, due to the Plaintiff's incapacity to sue, justice requires that the dismissal of Plaintiff's claims against Pitman be held in abeyance for thirty days. This action is warranted because Plaintiff has one final recourse, under Fed. R. Civ. P. 15(c) and 17(a), by which she can avoid a complete termination of her cause of action.

> Federal courts in interpreting Rules 15(c) and 17(a) have uniformly held that amendments

> showing a change in plaintiff's capacity to maintain the action relate back to the action's commencement. This principle has been specifically applied to wrongful death actions in which the plaintiff had not under applicable state law duly qualified as the personal representative until after the statute of limitations had run on the claim. The courts have permitted plaintiffs to show by a new pleading the due qualification and have the pleading relate back to the action's commencement. . . .
>
> Therefore, for relation back purposes, we shall treat supplement pleadings filed pursuant to Rule 15(d) the same as amendments filed pursuant to other sections of Rule 15. We hold that where, as here, the original pleading gives notice of the transactions and occurrences upon which the claim is based, a supplemental pleading that merely changes the capacity in which the plaintiff sues relates back to the commencement of the action as provided in Rule 15(c).

Burcl, 306 N.C. at 226-28, 293 S.E.2d at 93-94 (footnotes and citations omitted). Only Plaintiff's proper qualification as ancillary administrator or personal representative and a supplemental pleading attesting to that fact can prevent the loss of this otherwise time-barred cause of action. *See* N.C. Gen. Stat. § 1-53(4) (1983) (two year statute of limitation of death by wrongful act actions).

To date, no such supplemental pleading showing Plaintiff's satisfaction of the North Carolina personal representative statutory requirements has been filed. However, "[n]o action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection

for ratification of commencement of the action by, or joinder or substitution of, the real party in interest." Fed. R. Civ. P. 17(a). *See Burcl*, 306 N.C. at 230, 293 S.E. 2d at 94-95 (Rule 17(a) deals with questions of real party in interest *and* capacity to sue). The Court cannot infer such ratification from the record, but it may, since the Defendants' objections have only been recently filed, permit Plaintiff or a similarly situated substitute (such as Decedent's spouse) reasonable time to seek proper qualification as ancillary administrator or personal representative, to file a supplemental pleading establishing such qualification, and, thereby, to ratify the commencement of this action.

Once Plaintiff has availed herself of this Rule 17(a) reprieve, "leave [to amend or to file supplemental pleadings] shall be freely given when justice so requires." Fed. R. Civ. P. 15(a). In the instant case, as in *Burcl*,

> Defendant [Pitman] had full notice of the transactions and occurrences upon which this wrongful death claim is based when the claim was originally filed within the period of limitations by plaintiff in her capacity as a foreign administrator. They can in no way be prejudiced by allowing plaintiff by supplemental pleading to show the change in her capacity to that of locally qualified ancillary administrator, even though this change occurred after the period of limitations had run. The purpose served by the statute of limitations – protection against stale claims – is in no way compromised by allowing such a pleading to relate back to the action's commencement. To hold otherwise would be to return to hypertechnical pleading restrictions inimical to just resolution of disputed claims,

> restrictions which our present rules of pleading were designed to overcome.

Burcl, 306 N.C. at 230, 293 S.E.2d at 95. *See also Davis v. Piper Aircraft Corp.*, 615 F.2d 606, 611-14 (4th Cir.), *cert. dismissed*, 448 U.S. 911 (1980); *McNamara v. Kerr-McGee Chem. Corp.*, 328 F. Supp. 1058 (E.D.N.C. 1971); *Davis v. Rhodes*, 231 N.C. 71, 74, 56 S.E.2d 43, 45 (1949); *Ledford v. Martin*, 87 N.C. App. 88, 90, 359 S.E.2d 505, 506 (1987), *review denied*, 321 N.C. 473, 365 S.E.2d 1 (1988). Defendant Pitman would not [sic] prejudiced by a supplemental pleading and amendment of the complaint since it has had full notice of the transactions and occurrences upon which this death by wrongful act claim is based since the original filing of the complaint on November 29, 1989, in the Louisiana state court. Defendants Duke and B & D also suffer no prejudice since the statute of limitations on Pitman's available claim for contribution has yet to run. *See* N.C. Gen. Stat. § 1B-3(c) (1982) (requiring separate action for contribution to be commenced within one year after judgment of liability has become final).

In summary, the Court finds that Plaintiff lacks the capacity to sue Pitman in the instant case. However, in light of the facts and the record before the Court, Plaintiff's lack of any other relief if proper qualification and subsequent ratification of the commencement of the action is not allowed, the absence of prejudice suffered by any of the Defendants by such qualification and ratification, and the case law in this jurisdiction,[10] justice

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[10] Before the *Burcl* "transactions and occurrences" test for the relation back of a supplemental pleading, North Carolina courts required a good faith but mistaken belief that the party

requires that Plaintiff be afforded thirty days from the entry of this Order in which to establish her satisfaction of the North Carolina statutory requirements for ancillary administrator or personal representative qualification and the commencement of a death by wrongful act action in North Carolina. Justice further requires that, upon such qualification, Plaintiff be allowed to amend the complaint, and that such amendment be related back, for purposes of the applicable statute of limitations, to the date of the commencement of this action. Plaintiff's failure to qualify as an ancillary administrator or personal representative under North Carolina law within thirty days of the entry of this Order shall result in the dismissal of Plaintiff's claims against Pitman.

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bringing suit had properly qualified as a personal representative, *see, e.g., Reid*, 5 N.C. App. at 648-9, 169 S.E.2d at 16-17, or proof that "oversight, inadvertence, excusable neglect, or that justice required" amendment and relation back. *Merchants Distrib.*, 16 N.C. App. at 661, 193 S.E.2d at 440. Historically, North Carolina courts also rejected amendment and relation back where, as here, no application for letters of administration had been filed. *See, e.g., Graves*, 260 N.C. at 696-97, 133 S.E.2d at 767; *Johnson*, 22 N.C. App. at 10, 205 S.E.2d at 355. The Court finds however, in light of Plaintiff's reasonable albeit mistaken belief that her creation of the Succession of John Janeau under Louisiana law was sufficient for the commencement of this action, the *Reid* and *Merchants Distributors* tests would be satisfied by the facts of this case. Here, it was not apparent until after the Louisiana case was removed to federal court and transferred to North Carolina (both upon the motion of Defendant Pitman) and after the wrongful death statute of limitations had expired that qualification in North Carolina as personal representative was necessary or even desirable for the maintenance of this action. Therefore, amendment and relation back is proper under both the *Burcl* and the *Reid/Merchants Distributors* tests.

III. ORDER

IT IS, THEREFORE, ORDERED that:

1. The Motion to Dismiss of Defendant Pitman Manufacturing Company is hereby STAYED for thirty (30) days from the date of the entry of this Order, pending Plaintiff's proper qualification as a personal representative. Plaintiff's failure to so qualify within the prescribed time period shall result in dismissal of Plaintiff's claims against Pitman due to Plaintiff's incapacity to sue;

2. The Motion to Dismiss of Defendant Duke Power Company is ALLOWED, and Plaintiff's claims against Duke are hereby DISMISSED for lack of diversity jurisdiction;

3. The Motion for Summary Judgment of Defendant Duke Power Company is hereby DENIED as MOOT;

4. The Motion to Dismiss of Defendant B & D Contractors of Shelby, Inc. is ALLOWED, and Plaintiff's claims against B & D are hereby DISMISSED for lack of diversity jurisdiction; and

5. The Motion for Summary Judgment of Defendant B & D Contractors of Shelby, Inc. is hereby DENIED as MOOT.

THIS the 24th day of October, 1991.

/s/ Richard L. Voorhees
RICHARD L. VOORHEES,
CHIEF JUDGE
UNITED STATES
DISTRICT COURT

APPENDIX B

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

CIVIL DOCKET NO. C-C-90-194-V

BRENDA JANEAU,
Plaintiff,
vs.
PITMAN MANUFACTURING COMPANY, INC.,
Defendant.

ORDER OF DISMISSAL

(Filed Dec. 4, 1991)

THIS MATTER is before the Court on Defendant's Motion to Dismiss the captioned civil matter due to Plaintiff's incapacity to sue. For the reasons enumerated herein, Defendant's motion shall be allowed.

On October 25, 1991, this Court determined that Plaintiff lacked the capacity to sue Defendant in the instant case, due to Plaintiff's failure to qualify properly as a personal representative of Decedent John Ray Janeau under the provisions of North Carolina law. *See* Memorandum of Opinion and Order, filed October 25, 1991 (Pleading No. 39). In the interests of justice, however, the Court held Defendant's motion to dismiss in abeyance for thirty days, pending Plaintiff's satisfaction of the North Carolina statutory requirements for ancillary administrator or personal representative qualification. *See id.* at 2, 27. Upon timely satisfaction of this Requirement, Plaintiff

was to be permitted to amend her complaint, with said amendment to relate back to the date of the commencement of this action. *Id.* at 26. Plaintiff was expressly warned that "failure to qualify as an ancillary administrator or personal representative under North Carolina law within thirty days of the entry of this Order shall result in the dismissal of Plaintiff's claims against Pitman." *Id.* at 26-27.

Including the additional 3 days provided by the service-by-mail provision of Fed. R. Civ. P. 6(e), the deadline for Plaintiff to establish her satisfaction of the Court's Order of October 25, 1991, was November 27, 1991. The Court notes that an attorney representing Plaintiff contacted the undersigned's chambers approximately five days before the time limit expired, and was informed of the November 27 deadline. To date, no pleading has been filed by Plaintiff in an effort to prove her qualification as the Decedent's personal representative. Plaintiff has also failed to request an extension of time within which to comply with the October 25 Order. *See* Fed. R. Civ. P. 6(b). "No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest *until a reasonable time has been allowed* after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest. . . . " Fed. R. Civ. P. 17(a) (emphasis added). *See also* Fed. R. Civ. P. 17(b) (capacity to sue determined in accordance with the laws of North Carolina); *Davis v. Piper Aircraft Corp.*, 615 F.2d 606, 607-08 (4th Cir.), *cert. dismissed*, 448 U.S. 911 (1980). The Court finds that such reasonable time has been allowed for Plaintiff's qualification, and that Plaintiff has failed to so qualify.

IT IS, THEREFORE ORDERED that Defendant's Motion to Dismiss is hereby ALLOWED.

IT IS FURTHER ORDERED that Plaintiff's claims in the captioned civil matter are hereby DISMISSED due to Plaintiff's incapacity to sue Defendant in the instant case.

THIS the 4th day of December, 1991.

/s/ Richard L. Voorhees
RICHARD L. VOORHEES,
CHIEF JUDGE
UNITED STATES
DISTRICT COURT

APPENDIX C

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

CIVIL NO. C-C-90-194-V

BRENDA JANEAU, Plaintiff, vs. PITMAN MANUFACTURING COMPANY, INC., Defendant.	)	ORDER (Filed Dec. 19, 1991)

THIS MATTER is before the Court on Plaintiff's motion for reconsideration of this Court's Order of Dismissal, filed December 4, 1991 (Pleading No. 41). Plaintiff requests that her claims in the captioned civil matter be reinstated and that she be allowed to amend her Complaint so as to allege her capacity to sue. For the reasons stated herein, Plaintiff's motion shall be allowed, and her claims shall be reinstated.

On October 25, 1991, the Court found that Plaintiff lacked the capacity to sue Defendant in the instant case due to her failure to qualify properly as a personal representative of the estate of John Ray Janeau under North Carolina law. Memorandum of Opinion and Order, filed October 25, 1991 (Pleading No. 39) ["Opinion"]. However, pursuant to the dictates of justice and Fed. R. Civ. P. 15(a) and 17(a), the Court afforded Plaintiff thirty days within

which "to seek proper qualification as ancillary administrator or personal representative, to file a supplemental pleading establishing such qualification, and, thereby, to ratify the commencement of this action." *Id.* at 24. In other words, Plaintiff had until November 27, 1991, to comply with the Court's Opinion. *See* Fed. R. Civ. P. 6(e). Plaintiff's apparent failure to comply with the Court's Opinion in a timely fashion resulted in the dismissal of Plaintiff's Claims. Order of Dismissal, filed December 4, 1991 (Pleading No. 41).

It has subsequently come to the Court's attention that, although counsel for the Plaintiff did not file a supplemental pleading establishing proper qualification and ratifying this action until December 11, 1991, Plaintiff was properly qualified as an ancillary administrator on November 25, 1991. *See* Plaintiff's Motion for Reconsideration and Reinstatement, filed December 11, 1991 (Pleading No. 42), and Letters of Ancillary Administration attached thereunto.

It is true that counsel for the Plaintiff was first notified of the question of Plaintiff's capacity to sue on or about April 18, 1991, approximately six months prior to the Court's Opinion requiring Plaintiff to qualify as an ancillary administrator under North Carolina law within the ensuing thirty days. *See* Defendant's Opposition to Plaintiff's Motion for Reconsideration and Reinstatement, filed December 18, 1991 (Pleading No. 43) ["Opposition"]; Defendant Duke Power Company's Motion to Dismiss and for Summary Judgment, filed April 18, 1991 (Pleading No. 23). It is also true, as aptly stated by Defendant, that the Court does not possess the gift of omniscience and that a timely amended complaint is the only method

by which the Court could be notified of Plaintiff's qualification as an ancillary administrator. Defendant's Memorandum Supporting Opposition at 3.

However, the chief concern enunciated in the Court's Opinion was Plaintiff's capacity to maintain a cause of action in this court. Once Plaintiff secured Letters of Ancillary Administration on November 25, the basis for the Court's concern was eradicated. It is the policy of this Court is [sic] to dispose of cases on their merits, and not to purge the dockets on the basis of technical formalities. Furthermore,

> [t]he provision that no action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed, after the objection has been raised, for ratification, substitution, etc., is added simply in the interests of justice. . . .
>
> Modern decisions are inclined to be lenient when an honest mistake has been made in choosing the party in whose name the action is to be filed. . . . It is intended to prevent forfeiture when determination of the proper party to sue is difficult or when an understandable mistake has been made.

Notes of the Advisory Committee on Rules, 1966 Amendment to Fed. R. Civ. P. 17. The fact that Plaintiff has no other remedy for the claims raised in the captioned civil matter further justifies overlooking the inattentive handling of the Court's Opinion by counsel for the Plaintiff.

The Court hereby deems Plaintiff's Motion for Reconsideration and Reinstatement as the supplement

pleading, required by the Court's Opinion, establishing proper qualification of Plaintiff as ancillary administrator. Plaintiff must now establish ratification of the commencement of the action, or joinder or substitution of the real party in interest, as required by Fed. R. Civ. P. 17(a). To satisfy this requirement, Plaintiff or her counsel must, within ten (10) days of the entry of this Order, file an amended complaint with this Court, enumerating the claims asserted in the cause of action, establishing ratification, joinder, or substitution, and altering the case caption so as properly to reflect the representative capacity in which Plaintiff is bringing this cause of action. Only upon timely satisfaction of these requirements will Plaintiff's amendments be deemed to "relate back" under Fed. R. Civ. P. 15. Failure by Plaintiff or her counsel to so act within thirty days of the entry of this Order shall result in the dismissal of Plaintiff's claims against Pitman, and the possibility of sanctions against attorneys for the Plaintiff under Fed. R. Civ. P. 11 and 16(f).

IT IS, THEREFORE, ORDERED that:

1. Plaintiff's Motion for Reconsideration and Reinstatement is hereby ALLOWED; and

2. Plaintiff have [sic] ten (10) days within which to file an amended complaint, enumerating the claims asserted in the cause of action, establishing ratification of the commencement of the action, or joinder or substitution of the real party in interest, and altering the case caption so as to properly reflect the representative capacity in which Plaintiff is bringing this cause of action. Failure by Plaintiff or her counsel to so act within thirty days of the entry of this Order shall result in the dismissal of Plaintiff's claims against Pitman, and the possibility of sanctions

against attorneys for the Plaintiff under Fed. R. Civ. P. 11 and 16(f).

THIS the 18th day of December, 1991.

/s/ Richard L. Voorhees
RICHARD L. VOORHEES,
CHIEF JUDGE
UNITED STATES DISTRICT
COURT

APPENDIX D

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

CIVIL NO. C-C-90-194-V

BRENDA JANEAU, Plaintiff, vs. PITMAN MANUFACTURING COMPANY, INC., Defendant.	ORDER (Filed Jun. 30, 1992)

THIS MATTER is before the Court on Plaintiff's Motion for Reconsideration and Request for Oral Argument and memorandum in support thereof, filed May 22, 1992. Because Plaintiff's motion was filed within ten days of the entry of Judgment, *see* Judgment, filed May 14, 1992 (Pleading No. 63), the Court will construe this motion as a motion to alter or amend judgment under Fed. R. Civ. P. 59(e).[1] For the reasons stated herein, Plaintiff's motion for reconsideration and motion for oral argument shall be denied.

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[1] *See, e.g., Moody v. Pepsi-Cola Metro. Bottling Co.*, 915 F.2d 201 (6th Cir. 1990); *Dalton v. First Interstate Bank*, 863 F.2d 702, 703-04 (10th Cir. 1988); *Moore v. Bethesda Fire Dep't, Inc.*, No. 90-2906, 1991 U.S. App. LEXIS 15113 at *11 (4th Cir. July 15, 1991) (slip op.) (citing *Lavespere v. Niagara Machine and Tool Works, Inc.*, 910 F.2d 167, 173 (5th Cir. 1990)).

I. PROCEDURAL HISTORY

The factual background and procedural history of the instant case have been discussed in great detail in at least two previous Orders by this Court. *See* Order of Dismissal, filed May 7, 1992 (Pleading No. 62) ["Dismissal No. 2"]; Memorandum of Opinion and Order, filed October 25, 1991 (Pleading No. 39) ["October 25, 1991, Opinion & Order"]. However, because the history of the two and one-half year progression of this case through four different courts in two different states played a significant part in the Court's decision to dismiss this case, the Court will recount the procedural history of the case herein.

On December 5, 1988, John Ray Janeau ["Decedent"], then an employee of Southeastern Boring Contractors, Inc. ["Southeastern"], was electrocuted in a fatal construction site accident in Charlotte, North Carolina. While operating a Pitman HL-757 truck-mounted crane manufactured by the Defendant, Decedent and the crane came into contact with an energized power line owned and maintained by Duke Power Company ["Duke"]. The accident occurred on a job site maintained and managed by B & D Contractors of Shelby, Inc. ["B & D"], who had subcontracted with Southeastern for a portion of the work to be completed. Both Duke and B & D are North Carolina corporations with their principal places of business in North Carolina.

On November 2, 1989, Plaintiff, the mother of the Decedent and a citizen of Louisiana, was appointed provisional administratrix of the "Succession of John Ray Janeau" by the 25th Judicial District Court for the Parish

of Plaquemines, Louisiana. She commenced this wrongful death action against Defendant, a Pennsylvania corporation with its principal place of business in Pennsylvania, in the Civil District Court for the Parish of Orleans, State of Louisiana, on November 29, 1989. Defendant filed a notice of removal on January 4, 1990, thereby removing this case to the United States District Court for the Eastern District of Louisiana. After some preliminary discovery,[2] the case was transferred on June 20, 1990, to the Western District of North Carolina, Charlotte Division, upon Defendant's motion.

Six months later,[3] without explanation for the delay, Plaintiff moved to amend her complaint so as to name Duke and B & D as co-Defendants, alleging for the first time that those parties were "liable to plaintiff jointly, severally, and *in solido* with each other and defendant, Pitman Manufacturing, Inc." Plaintiff's First Supplemental and Amending Complaint, filed December 6, 1990

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[2] There was apparently very little activity by either party during the period from January, 1990, to June, 1990. Most noticeably, Defendant successfully moved for a court order compelling discovery from the Plaintiff, and Plaintiff filed two notices of deposition of the Defendant. *See* Defendant Pitman Manufacturing Company's Motion to Compel Discovery from Plaintiff, filed March 12, 1990 *attached to* Record as transferred from United States District Court, Eastern District of Louisiana, filed June 25, 1990 (Pleading No. 1) ["Louisiana Record"]; Notice of 30(b)(6) Deposition, filed March 29, 1990 *attached to* Louisiana Record; Re-Notice of 30(b)(6) Deposition, filed April 5, 1990 *attached to* Louisiana Record.

[3] Between June 20, 1990, and December 6, 1990, Plaintiff neither filed pleadings nor communicated with the Court in any fashion.

(Pleading No. 16). Leave was granted for the filing of the amended complaint on December 12, 1990, and the case was subsequently transferred to this Court on February 27, 1991, when a potential conflict of interest arose in Charlotte. Although added as co-Defendants in December, 1990, neither Duke nor B & D were served by Plaintiff before March 25, 1991, again without explanation for the delay. *See* Answer of B & D Contractors of Shelby, Inc. at 4, filed April 11, 1991 (Pleading No. 22) ["B & D's Answer"]; Duke Power Co.'s Acknowledgment of Receipt of Summons and Complaint, filed April 9, 1991 (Pleading No. 21).

Responsive pleadings by Duke and B & D brought to light the issues of lack of diversity jurisdiction and Plaintiff's incapacity to sue, due to her failure to qualify properly as a personal representative of Decedent's estate under North Carolina law. *See, e.g.*, B & D's Answer at 3; Duke Power Co.'s Motion to Dismiss and for Summary Judgment at 2-3, filed April 16, 1991 (Pleading No. 23). After considering oral arguments[4] and voluminous briefs from all parties, the Court dismissed the case as to Duke and B & D for lack of diversity jurisdiction, and afforded Plaintiff thirty days from the October 25, 1991, filing of that Opinion and Order, or until November 27, 1991, within which "to seek proper qualification as ancillary

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[4] The case came before the undersigned for oral argument on June 10, 1990, on Duke's motion to dismiss and for summary judgment, B & D's motion to dismiss and for summary judgment, and Defendant's motion to dismiss. All motions were taken under advisement and the parties were allowed to submit additional briefs as they saw fit.

administrator or personal representative, *to file a supplemental pleading establishing such qualification*, and, thereby, to ratify commencement of this action." October 25, 1991, Opinion & Order at 24 (emphasis added). This additional thirty-day period for qualification was permitted even though "counsel for the Plaintiff was first notified of the question of Plaintiff's capacity to sue on or about April 18, 1991, approximately six months prior to the Court's Opinion requiring Plaintiff to qualify as an ancillary administrator under North Carolina law within the ensuing thirty days." Order at 2, filed December 19, 1991 (Pleading No. 44). "Plaintiff's failure to qualify as an ancillary administrator or personal representative under North Carolina law within thirty days of the entry of this Order *shall* result in the *dismissal* of Plaintiff's claims against Pitman." Opinion & Order at 26-27 (emphasis added).

As of December 3, 1991, the Court had received no notice that Plaintiff had indeed qualified as a personal representative under North Carolina law. Therefore, upon motion of the Defendant, the Court dismissed the instant case for Plaintiff's failure to comply with an order of the Court in a timely fashion. *See* Motion to Dismiss, filed December 3, 1991 (Pleading No. 40); Order of Dismissal, filed December 4, 1991 (Pleading No. 41) ["Dismissal No. 1"]. A subsequent motion for reconsideration filed by the Plaintiff on December 11, 1991, revealed that, "although Plaintiff had indeed timely qualified as a personal representative of the decedent's estate, counsel for the Plaintiff failed to notify the Court of such qualification until two weeks after the Court-imposed deadline for qualification and one week after the Court's dismissal of the case for

failure to timely qualify," in direct violation of the Court's October 25, 1991, Order. Dismissal No. 2 at 3 n.3. No explanation was offered for Plaintiff's failure to comply in a timely fashion. However, the Court rescinded its first Order of Dismissal on December 19, 1991, with warnings of dismissal and other sanctions for further transgressions by counsel for the Plaintiff, and permitted the case to go forward upon filing of an amended complaint by the Plaintiff.

Since filing of her Third Amended Complaint on December 30, 1991, Plaintiff neither filed pleadings nor communicated with the Court until May 22, 1992, the date of the motion for reconsideration presently at issue. Plaintiff similarly failed to respond to Defendant's proposal for a consensual discovery schedule,[5] Defendant's Motion for Scheduling Order, dated February 19, 1992, the Court's Order establishing said discovery schedule, dated March 3, 1992, or Defendant's Motion to Dismiss

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[5] "Pitman has attempted to work with plaintiff toward the end of preparing a Joint Motion for Scheduling Order. In correspondence dated February 12, 1992, . . . undersigned counsel explained Pitman's proposed Scheduling Order and sought plaintiff's counsel's input. The correspondence was followed by two phone calls in an attempt to discuss this matter with plaintiff's counsel. No reply has been received from plaintiff's counsel." Memorandum in Support of Pitman Manufacturing Company, Inc.'s Motion for Scheduling Order, filed February 19, 1992 (Pleading No. 50) ["Defendant's Scheduling Order Memorandum"].

It should also be noted that the undersigned's law clerk placed two telephone calls to counsel for the Plaintiff seeking a response to Defendant's Motion for Scheduling Order, to no avail.

and/or Alternatively to Strike Plaintiff's Use of Experts at the Trial of This Matter, filed April 21, 1992. As noted in this Court's second Order of Dismissal,

> the Court waited 13 days for Plaintiff's response to Defendant's motion for a discovery scheduling order. When no response was forthcoming, the Court entered the requested scheduling order. *See* Order, filed March 3, 1992 (Pleading No. 51). Plaintiff's failure to comply with the first deadline set forth in that Order prompted the motion to dismiss considered herein. Fifteen days have passed since the filing of Defendant's motion to dismiss, and Plaintiff has yet to respond to the pending motion.

Dismissal No. 2 at 3-4 (footnotes omitted). "[B]ased on the failure by counsel for the Plaintiff either to comply with the scheduling order or to make or cooperate in discovery, . . . [and] '[f]or failure of the plaintiff to prosecute [and] to comply with these rules [and] any order of court,' " the Court dismissed the instant case with prejudice on May 7, 1992, pursuant to Fed. R. Civ. P. 16(f), 37(b), and 41(b). *Id.* at 4-5 (quoting Fed. R. Civ. P. 41(b)).

To date, Plaintiff has offered no explanation for her failure to respond to the Defendant's February 19, 1992, and April 21, 1992, motions or the Court's March 3, 1992, Order, or her failure to comply with April 15, 1992, discovery deadline.[6] At a minimum, Plaintiff had from

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[6] The provision of the discovery schedule referenced by Plaintiff's Motion for Reconsideration, and cited by the Court's second Order of Dismissal, reads as follows:

February 19, 1992, the filing date for Defendant's Motion for Scheduling Order, to May 7, 1992, the filing date for the second Order of Dismissal, to notify the Court of any objections to or difficulties with the discovery schedule or to propose an alternative discovery schedule. Instead, the Motion for Reconsideration at issue here is the first objection by Plaintiff to *any* provision of the discovery schedule or the second dismissal of this case.

From the filing of the initial complaint in this case to the present, there have been four different complaints presented by Plaintiff,[7] two answers by Defendant,[8] one motion by Defendant to compel discovery,[9] at least two

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> Deadline for Plaintiff to disclose all fact and expert witnesses and to provide Defendant with expert reports – April 15, 1992. . . .

Order, filed March 3, 1992 (Pleading No. 51).

[7] Petition for Damages, filed November 29, 1989 *attached to* Louisiana Record; Plaintiff's First Supplemental and Amending Complaint, filed December 6, 1990 (Pleading No. 16); Third Amended Complaint, filed December 30, 1991 (Pleading No. 46). Because Plaintiff failed to obtain either leave of this Court or written consent of the Defendant, *see* Fed. R. Civ. P. 15(a), Plaintiff's second amended complaint was not filed as part of the record. *See* Second Amended Complaint, received December 11, 1991.

[8] Answer and Defenses of Defendant Pitman Manufacturing Company, filed January 11, 1990 *attached to* Louisiana Record; Answer and Defense of Defendant Pitman Manufacturing Company to Plaintiff's Third Amended Complaint, filed January 2, 1992 (Pleading No. 47).

[9] Defendant Pitman Manufacturing Company's Motion to Compel Discovery from Plaintiff, filed March 12, 1990 *attached to* Louisiana Record.

flagrant violations of the Pretrial Order by the Plaintiff,[10] two violations of other Orders entered by the undersigned,[11] thirteen deposition notices filed by Defendant,[12]

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[10] "Responses to motions, if any, must be filed *within fourteen (14) days* of the date on which the certificate of service is signed. . . . " Pretrial Order for Reassigned Cases at 6, filed November 20, 1990 (Pleading No. 12) (emphasis in original). Plaintiff's first response of any kind to Defendant's Motion for Scheduling Order, the Motion for Reconsideration discussed herein, was filed ninety-three days after Defendant's motion. Plaintiff's response to Defendant's second Motion to Dismiss was filed thirty-one days after Defendant's motion, and fifteen days after this Court's second Order of Dismissal.

[11] As discussed *supra*, in violation of the Court's October 25, 1991, Opinion and Order, Plaintiff neglected to file a supplemental pleading establishing proper qualification as a personal representative of Decedent's estate until December 11, 1991, sixteen days after the expiration of the deadline established by the Court's October 25, 1991, Opinion and Order and seven days after the Court's first Order of Dismissal. Plaintiff also violated this Court's March 3, 1992, Order by failing "to disclose all fact and expert witnesses and to provide Defendant with expert reports" by April 15, 1992. Order, filed March 3, 1992 (Pleading No. 51).

[12] *See* Notice of Deposition of Brenda Janeau, filed August 17, 1990 (Pleading No. 4); Notice of Deposition of Brenda Janeau, filed September 4, 1990 (Pleading No. 5); Notice of Deposition, filed October 11, 1990 (Pleading No. 6); Notice of Deposition, filed November 2, 1990 (Pleading No. 9); Notice of Deposition, filed June 14, 1991 (Pleading No. 34a); Notice of Deposition, filed February 4, 1992 (Pleading No. 48); Notice of Rule 30(b)(6) Deposition of B & D Contractors, Inc., filed April 28, 1992 (Pleading No. 54); Notice of Deposition, filed April 28, 1992 (Pleading No. 55); Notice of Rule 30(b)(6) Deposition of Duke Power, filed April 28, 1992 (Pleading No. 56); Notice of Deposition, filed April 28, 1992 (Pleading Nos. 57, 58, 59, 60). In comparison, Plaintiff has filed only two notices of deposition, both dated 1990. *See* note 2 *supra*.

six months of unexplained delay by Plaintiff in moving to add Duke and B & D as co-Defendants, nearly four months of unexplained delay by Plaintiff in serving Duke and B & D, eight months of delay resulting from Plaintiff's lack of capacity to sue,[13] and two dismissals. No depositions were taken from at least December, 1990, to February, 1992. *See* Defendant's Scheduling Order Memorandum at 1. To date, Plaintiff has apparently failed to name any proposed expert witness or to identify any alleged defect in Defendant's crane. *See, e.g., id.;* Defendant's Motion to Dismiss and/or Alternatively to Strike Plaintiff's Use of Experts at the Trial of This Matter, filed April 21, 1992 (Pleading No. 52); Memorandum in Support of Defendant's Motion to Dismiss and/or Alternatively to Strike Plaintiff's Use of Experts at the Trial of This Matter, filed April 21, 1992 (Pleading No. 53) ["Defendant's Dismissal Memorandum"]. In short, "[t]he captioned civil matter . . . is no closer to trial readiness now than it was on the day the initial complaint was filed." Dismissal No. 2 at 1.

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[13] The issue of proper qualification of Plaintiff as personal representative of Decedent's estate under North Carolina law resulted in an additional eight-month delay in the resolution of this case, from April, 1991, when the issue of proper qualification of Plaintiff as personal representative of Decedent's estate under North Carolina law was first called to the parties' attention, *see* B & D's Answer at 3, to December, 1991, when Plaintiff was finally so qualified. *See* Motion for Reconsideration and Reinstatement, filed December 11, 1991 (Pleading No. 42). Although contesting the issue of proper qualification, counsel for the Plaintiff could have demonstrated due diligence by immediately qualifying Plaintiff as a personal representative under North Carolina law, thereby rendering moot any question of qualification.

II. DISCUSSION

A. Legal Standard for Rule 59(e) Motion

The decision whether to reopen a case under Rule 59(e) is committed to the sound discretion of the trial court. *See, e.g., Boryan v. United States,* 884 F.2d 767, 771 (4th Cir. 1989); *Appeal of Sun Pipe Line Co.,* 831 F.2d 22, 25 (1st Cir. 1987) ("[O]nce the ball has ended, the district court has substantial discretion in deciding whether to strike up the band again. . . . "), *cert. denied sub nom. Sun Pipe Line Co. v. Environmental Protection Agency,* 486 U.S. 1055 (1988); *American Home Assurance Co. v. Glenn Estess & Assocs., Inc.,* 763 F.2d 1237, 1238-39 (11th Cir. 1985). A Rule 59(e) motion may be granted on one of three grounds: "(1) an intervening change in the controlling law has occurred, (2) evidence not previously available has become available, or (3) it is necessary to correct a clear error of law or prevent manifest injustice." *Weyerhaeuser* [sic] *Corp. v. Koppers Co.,* 771 F. Supp. 1406, 1419 (D. Md. 1991) (citing *Natural Resources Defense Council v. U.S. E.P.A.,* 705 F. Supp. 698, 702 (D.D.C.), *vacated on other grounds,* 707 F. Supp. 3 (D.D.C. 1989)).

B. Plaintiff's Arguments in Support of Rule 59(e) Motion

After reviewing Plaintiff's supporting memorandum, the Court discerns three arguments asserted by Plaintiff in support of her motion for reconsideration: (1) inherent flaws in the Court's Order establishing a discovery schedule; (2) Plaintiff was engaged in prosecuting the case at the time of the Court's dismissal of the instant case; and

(3) the undue harshness of the sanction of dismissal with prejudice for Plaintiff's actions. Hence, the only Rule 59(e) ground with any bearing on the instant case is the necessity "to correct a clear error of law or prevent manifest injustice." *Weyerhaeuser* [sic] *Corp.*, 771 F. Supp. at 1419.

1. Flawed Discovery Schedule Order

Plaintiff first argues that the discovery schedule established by the Court was flawed in that, because the schedule "provided for the taking of fact witness depositions subsequent to the cutoff date for expert witness reports," Plaintiff's expert witnesses would have been unable to review fact witness depositions in the formulation of their opinions. Memorandum in Support of Plaintiff's Motion for Reconsideration and Request for Oral Argument at 1 ["Plaintiff's Memorandum"] *attached to* Plaintiff's Motion for Reconsideration and Request for Oral Argument, filed May 22, 1992 (Pleading No. 64). Plaintiff attributes this purported flaw to the fact that the proposed discovery schedule was "unilaterally submitted" to the Court by the Defendant. *Id.*

Plaintiff's untimely objection to the discovery schedule does have some merit, in that final expert opinions would require review of fact witnesses' accounts of the accident. However, the identity of fact and expert witnesses, preliminary non-conclusive expert opinions or reports, and investigations and discovery conducted between Decedent's death in 1988 and the present time could be disclosed, in compliance with the discovery schedule, regardless of the dates of depositions for fact

witnesses. Plaintiff violated the April 15 discovery deadline by neglecting to identify *any* fact or expert witness and by failing to provide *any* expert reports containing either initial or final expert opinions. Plaintiff offers no explanation or justification for her violation of the April 15 deadline, or for her failure to comply partially with the deadline by providing available information and offering supplemental information as available. Plaintiff's failure to timely respond, object, or otherwise notify the Court as to any perceived flaw in the discovery schedule or any inability or difficulty in complying therewith expressly refutes Plaintiff's characterization of the discovery schedule as "unilaterally submitted."

Furthermore, "[g]enerally, parties cannot use a rule 59(e) motion to raise arguments which could, and should, have been made before the judgment issued." *Building & Constr. Trades Dep't v. Rockwell Int'l Corp.*, 758 F. Supp. 1428, 1429 (D. Colo. 1991). *See also White v. New Hampshire Dep't of Employment Security*, 455 U.S. 445, 451 (1982); *Lussier v. Dugger*, 904 F.2d 661, 667 (11th Cir. 1990). Plaintiff could have called the Court's attention to this purported flaw in the discovery schedule in this case at any time prior to the second Order of Dismissal. Instead, Plaintiff disregarded Defendant's Motion for Scheduling Order, violated the discovery schedule entered by Order of this Court, ignored Defendant's subsequent motion to dismiss, and waited two weeks before responding to the second Order of Dismissal. In light of these facts, the Court cannot find that a clear error of law has occurred or that manifest injustice is present.

2. Plaintiff's Prosecution of the Instant Case

Plaintiff's second argument is that dismissal under Fed. R. Civ. P. 41(b) is inappropriate in the instant case, in that Plaintiff was engaged in prosecuting the case at the time of the Court's second Order of Dismissal. "From Wednesday, May 6 through Friday, May 8, 1992, counsel for the parties deposed seven (7) fact witnesses in the captioned action." Plaintiff's Memorandum at 1.

The May, 1992, depositions referenced by Plaintiff were scheduled by counsel for the Defendant. *See* note 13 *supra*. Prior to May, 1992, the only depositions even scheduled by Plaintiff date back to 1990. *See* note 2 *supra*. Notwithstanding those depositions, Plaintiff's only actions in the instant case since June 13, 1991, have centered on keeping this cause of action alive rather than furthering this case toward trial or settlement. *See* Plaintiff's Memorandum in Opposition to Motion for Summary Judgment, filed June 13, 1991 (Pleading No. 34); Plaintiff's Motion for Reconsideration and Reinstatement, filed December 11, 1991 (Pleading No. 42); Plaintiff's Motion for Oral Argument on Motion for Reconsideration and Reinstatement, filed December 20, 1991 (Pleading No. 45); Third Amended Complaint, filed December 30, 1991 (Pleading No. 46).

It is true that Rule 41(b) dismissal is "a harsh sanction which should not be invoked lightly in view of 'the sound public policy of deciding cases on their merits.' " *Davis v. Williams*, 588 F.2d 69, 70 (4th Cir. 1978) (quoting *Reizakis v. Loy*, 490 F.2d 1132, 1135 (4th Cir. 1974)). However, it is also true that a court must consider "the need to

manage its docket" and "the public interest in expeditious resolution of litigation." 2 *Motions in Federal Court* 499 (2d ed. 1991). In dismissing this case under Rule 41(b), the Court considered the following factors: "(1) the degree of personal responsibility on the part of the plaintiff; (2) the amount of prejudice to the defendant caused by the delay; (3) the presence or absence of a 'drawn out history' of 'deliberately proceeding in a dilatory fashion'; and (4) the effectiveness of sanctions less drastic than dismissal." *Davis*, 588 F.2d at 70 (quoting *McCargo v. Hedrick*, 545 F.2d 393, 396 (4th Cir. 1976)). *See also Herbert v. Saffell*, 877 F.2d 267, 270 (4th Cir. 1989).

The Court is unable to determine from the record whether Plaintiff was personally responsible for the failure to prosecute the instant case. However, as set forth in Section I *supra*, there is ample evidence of dilatory conduct by counsel for the Plaintiff throughout the existence of the instant case. In light of this procedural history, the only reasonable conclusion is that such dilatory conduct was the result of intentional abuse of the judicial process and vexatious, deliberate activities directed toward the Defendant. Defendant has suffered significant prejudice as a result, as demonstrated by the plethora of repetitive pleadings filed by Defendant in response to the shortcomings of counsel for the Plaintiff. Plaintiff's lackadaisical prosecution of the instant case has required Defendant to submit two answers, numerous refilings of notices of depositions, motions to compel discovery, and briefs ranging in topics from removal to estate law. In effect, Plaintiff asks the Court to resurrect a case which the Defendant, in reliance on the first termination of the action, has already closed out once. The amount of undue

prejudice, in the form of unnecessary expenditures of time, money, resources, and effort in preparation for a trial that has been repeatedly delayed by opposing counsel's lack of diligent preparation, inflicted upon Defendant by counsel for the Plaintiff's procrastinatory history is grossly inequitable and cannot be permitted to continue.

3. Availability of Less Drastic Sanctions

Plaintiff's third argument in support of her motion for reconsideration, the undue harshness of dismissal with prejudice, is sufficiently similar to the fourth factor enunciated in the *Davis* decision, the availability and effectiveness of sanctions less drastic than dismissal, to warrant discussing them together. Because the Court also dismissed the instant case under Fed. R. Civ. P. 37(b), which requires a similar consideration of sanctions less drastic than dismissal, the Court considered and hereinafter reiterates the ineffectiveness and unavailability of less drastic sanctions according to the following criteria: "(1) the needs of the discovery party; (2) the nature of the non-compliance; (3) 'how the absence of such evidence [not produced] would impair [the other party's] ability to establish their case'; (4) whether the non-compliance party's conduct would deprive the other party of a fair trial." *Aerodyne Systems Eng'g, Ltd. v. Heritage Int'l Bank*, 115 F.R.D. 281, 290 (D. Md. 1987) (quoting *Wilson v. Volkswagen of Am., Inc.*, 561 F.2d 494, 505 (4th Cir. 1977); *Snead v. Automation Indus., Inc.*, 102 F.R.D. 823, 829 (D. Md. 1984)) (Fed. R. Civ. P. 37(b)). *See also Herbert*, 877 F.2d

at 270 (Fed. R. Civ. P. 41(b)); *McCargo*, 545 F.2d at 396 (same).

Plaintiff's cause of action centers around allegations of negligent design, fabrication, and manufacture of a Pitman HL-757 truck-mounted crane, failure to properly warn of the inherent dangers and hazards of said crane, and failure to issue adequate safety instructions. *See, e.g.*, Third Amended Complaint, filed December 30, 1991 (Pleading No. 46). Because of the complex technological evidence that Plaintiff must produce to satisfy her burden of proof, including such diverse areas of specialized knowledge as mechanical engineering, metallurgy, electrical conductivity, and industry safety standards, expert witnesses and "scientific, technical, or other specialized knowledge" will be necessary to "assist the trier of fact to understand the evidence or to determine a fact in issue." Fed. R. Evid. 702. The absence of expert testimony in the instant case would effectively preclude any recovery by the Plaintiff, since the factual issues in question could not be resolved merely by the "common knowledge" or "common experience" of the jury. *Scott v. Sears, Roebuck & Co.*, 789 F.2d 1052, 1055 (4th Cir. 1986). *See also Patterson v. McLean Credit Union*, 805 F.2d 1143, 1147 (4th Cir. 1986), *aff'd in part, vacated in part on other grounds*, 491 U.S. 164 (1989); *United States v. Downing*, 753 F.2d 1224, 1229 (3d Cir. 1985); *United States v. Gold*, 743 F.2d 800, 817 (11th Cir. 1984), *cert. denied*, 469 U.S. 1217 (1985).

The Federal Rules of Civil Procedure specifically provide for the kind of expert witness discovery sought by the Defendant and disregarded by the Plaintiff. Fed. R. Civ. P. 26(b)(1), (4). To date, however, Plaintiff's most detailed response to Defendant's inquiries about expert

witnesses is an evasive "I do not know who will be called as an expert witness at the present time." Plaintiff's Answers to Interrogatories at 2, dated February 22, 1990 *attached to* Louisiana Record. Plaintiff has failed to supplement this response by providing even the identity of proposed expert witnesses, or to clarify its allegations of negligence. *See* Defendant's Dismissal Memorandum at 2-5; Fed. R. Civ. P. 26(e)(1)(B) (imposing duty upon parties to supplement information as to identity of expert witnesses). " '[A]dvance knowledge through pretrial discovery of an expert witness's basis for his opinion is essential for effective cross-examination.' " *Smith v. Ford Motor Co.*, 626 F.2d 784, 793 (10th Cir. 1980) (quoting Graham, Discovery of Experts Under Rule 26(b)(4) of the Federal Rules of Civil Procedure: Part One, An Analytical Study, 1976 U.Ill. L.F. 895, 897), *cert. denied*, 450 U.S. 918 (1981). *See also* Notes of Advisory Committee on Rules as to 1970 Amendment to Fed. R. Civ. P. 26(b)(4).

Defendant has both a need and a right to know Plaintiff's proposed expert witnesses and the subject matter and basis for their testimony. Fed. R. Civ. P. 26(b)(4)(A), (B). Plaintiff has failed to comply with the requested discovery by deliberately ignoring Defendant's repeated requests for expert witness discovery and the Court's Order establishing an April 15, 1992, deadline for said discovery. The absence of such evidence has prevented Defendant from adequately preparing a defense to the allegations of negligence to be presented at trial, and frustrated any attempt to formulate effective cross-examination of Plaintiff's proposed experts. After two and one-half years, Defendant still has no way of knowing

what could be done to defend against Plaintiff's allegations of negligence. Plaintiff's conduct would clearly deprive Defendant of a fair trial.

Less drastic sanctions under Rules 37(b) and 41(b) are grossly inadequate and inappropriate in light of the lackadaisical prosecution of the instant case. As stated above, exclusion of expert testimony on the issues of Defendant's negligence and failure to warn would prevent Plaintiff from satisfying her burden of proof at trial, thereby effectively dismissing the case. Any perpetuation of the case would merely compound the prejudice already suffered by Defendant, in that Defendant would still be required to prepare a defense against some illusory allegation of negligence that two and one-half years of procedural antics and discovery shenanigans have failed to resolve. Therefore, monetary sanctions against counsel for the Plaintiff or an Order requiring withdrawal of counsel for the Plaintiff are inadequate. Other Rule 37 sanctions, including striking pleadings, taking the matters in issue as established, staying proceedings, and contempt proceedings, are similarly unavailing. In fact, dismissal has been tried once already, to no avail. "The resurrection of this case after one dismissal should have purged this matter of any further procrastination by any party. Obviously, the mere threat of dismissal has not had this effect." Dismissal No. 2 at 4. One would be hard pressed to argue that a less drastic sanction would be appropriate where the ultimate sanction of dismissal has already failed. "The history of dilatory practices displayed by counsel for the Plaintiff leaves this Court with no reasonable alternative but dismissal of this cause of action." *Id.* at 4.

III. CONCLUSION

In light of the inordinate and continuing prejudice inflicted upon Defendant by Plaintiff's delays, the prolonged history of contumacious, dilatory practices by the Plaintiff, and the unavailability and ineffectiveness of reasonable sanctions less drastic than dismissal, the Court reaffirms its earlier conclusion that dismissal for failure to prosecute, pursuant to Fed. R. Civ. P. 41(b), is warranted in the instant case. The failure of counsel for the Plaintiff to comply with the scheduling order and to make or cooperate in discovery, and the absence of effective less drastic sanctions, supports this Court's acceptance of its earlier ruling that this case should also be dismissed under Fed. R. Civ. P. 37(b). Finally, the futility of less drastic sanctions, combined with Plaintiff's violation of the Pretrial Order and two other Orders entered by the undersigned, ***see*** **notes 11 and 12** ***supra,*** justifies the Court's dismissal of the instant case under Fed. R. Civ. P. 16(f).[14]

In light of the foregoing discussion, the Court finds no basis for Plaintiff's Motion for Reconsideration under Fed. R. Civ. P. 59(e). There is neither a clear error of law to be corrected nor a manifest injustice to be prevented. Instead,

> [p]roviding plaintiff with a second or third chance following a procedural default is a

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[14] *See, e.g., National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639 (1976); *Ford v. Fogarty Van Lines, Inc.*, 780 F.2d 1582 (11th Cir. 1986); *Poulis v. State Farm Fire & Casualty Co.*, 747 F.2d 863 (3d Cir. 1984).

> "lenient sanction," which, when met with further default, may justify imposition of the ultimate sanction of dismissal with prejudice. . . . [W]here "plaintiff was fully and repeatedly apprised of the possible imposition of the . . . sanction [of dismissal with prejudice]," it was not necessary for the district court to consider "other possible sanctions. . . . "

Callip v. Harris County Child Welfare Dep't, 757 F.2d 1513, 1521 (5th Cir. 1985) (quoting *Ramsay v. Bailey*, 531 F.2d 706, 709 n.2 (5th Cir. 1976)). Plaintiff's motion for reconsideration must therefore be denied. Plaintiff's request for oral argument will also be denied, in that the record is sufficiently complete and the Court is adequately familiar with the facts of the case to allow proper resolution of the motion considered herein.

IV. ORDER

IT IS, THEREFORE, ORDERED that Plaintiff's Motion for Reconsideration, considered herein as a motion to alter or amend judgment under Fed. R. Civ. P. 59(e), is hereby **DENIED.**

IT IS FURTHER ORDERED that Plaintiff's Request for Oral Argument is hereby **DENIED.**

THIS the 30th day of June, 1992.

/s/ Richard L. Voorhees
RICHARD L. VOORHEES,
CHIEF JUDGE
UNITED STATES DISTRICT
COURT